Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07875/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2017	**On 5 October 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

WC
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gajjar, Counsel, instructed on a Direct Access basis
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal A M Black (the judge), promulgated on 14 November 2016, dismissing the Appellant's appeal against the Respondent's decision made on 1 March 2016 to refuse his human rights claim.

Relevant background

2. The Appellant is a national of Zambia, date of birth [ ] 1991. He entered the UK on 1 May 1995 as a visitor. He was aged 4 years old. Although an application was made on 2 November 1995 for him to be treated as a dependent of his mother, this was refused with no right

of appeal. He was however granted Indefinite Leave to Remain (ILR) on 6 January 2006 under the terms of the Family ILR exercise.

3. The Appellant has been convicted of several criminal offences. On 4 May 2010 he was convicted and fined for possession of a Class B drug (cannabis). On 26 August 2010, he was convicted of making a false representation to make gain for himself or another or to cause loss to another, for which he received a 6-month sentence of imprisonment suspended for 24 months, a supervision order and unpaid work requirement of 80 hours. On 31 March 2011, the Appellant received a conditional discharge for 12 months for possession of cannabis. He pleaded guilty to a similar offence and received a community order on 6 February 2013. He failed to comply with the requirements of this community order and was ordered, on 4 April 2013, to continue the community order and an unpaid work requirement of 7 hours. On 1 November 2013, the Appellant was convicted of assault occasioning Actual Bodily Harm and received a 12 month prison sentence, suspended for 18 months. He was also made the subject of a supervision order and a 12 months activity requirement. On 23 June 2014, he received a conditional discharge of 6 months for criminal damage, and on 9 September 2014 the Appellant was sentenced to 6 weeks imprisonment for possession of an offensive weapon in a public place.

4. On 10 October 2014, the Appellant was convicted of harassment. He was sentenced to 6 months imprisonment and made the subject of a restraining order for 5 years. As he failed to comply with the community requirements of the previous suspended sentence he was sentenced to 12 months imprisonment.

5. On 1 March 2016, the Respondent made a deportation order pursuant to section 32 (5) of the UK Borders Act 2007. On the same date, the Respondent refused a human rights claim made by the Appellant. This is the decision that was appealed to the First-tier Tribunal.

The First-tier Tribunal decision

6. The judge set out a summary of the Appellant's claim and the reasons advanced by the Respondent for refusing the claim. The judge heard oral evidence from the Appellant, the Appellant's sister (AV), and two friends (DC, and AWP). The judge accurately set out the burden and standard of proof and the appropriate legal provisions (the relevant immigration rules – especially paragraphs 398, 399 and 399A, and sections 117A-D of the Nationality, Immigration and Asylum Act 2002).

7. From [39] the judge considered the Appellant's relationship with his siblings, and in particular his youngest sister. The judge noted that the evidence of his involvement in their care and upbringing was extremely thin. The judge found that the Appellant's involvement with his youngest sister was not akin to a parental role. The judge concluded, and it has not been challenged, that the Appellant does not have a genuine and subsisting parental relationship with a child

under the age of 18. In so doing the judge expressly took into account the need to consider the best interests of children pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009.

8. The judge then considered whether the Appellant met the requirements of paragraph 399A, which is reflected in s117C(4). At [43] the judge noted that the Appellant had lived in Zambia until the age of 4, that he entered the UK as a visitor on 1 May 1995, but that he had lived illegally in the UK from about 1 December 1995 to 6 January 2006, a period of about 10 years. The judge noted that the Appellant had ILR for about 10 years. Having regard to the whole of the Appellant's immigration history the judge concluded that he had not been lawfully resident in the UK for "most of his life", as required by both paragraph 399A(a) and s.117C(4)(a).

9. At [44] the judge considered whether there were 'very significant obstacles' to the Appellant's integration in Zambia, as required by paragraph 399A(c) and s.117C(4)(c). The judge noted that the Appellant was a Zambian national, that he had a current and Zambian passport, that he was a healthy adult and that English was spoken in Zambia. The judge noted that the Appellant had various vocational qualifications which he would be able to use to find work in Zambia, particularly in the building industry. Whilst the Appellant had no immediate family in Zambia the judge noted that his parents were born there. As a result, the judge founded likely that the Appellant would have wider family members in Zambia with whom he could make contact. The judge noted, in any event, that the Appellant's mother currently accommodated and maintained him and that there was no evidence to suggest that she would not do so at least in the short term until the Appellant could find a job and was able to accommodate and maintain himself. The judge additionally noted that the Appellant had lived independently, outside the family unit, and could live independently in Zambia. The judge finally noted that the Appellant could maintain contact with his family and friends in the UK by remote forms of communication and through personal visits by friends and family to Zambia. The judge therefore concluded that there were no very significant obstacles to the Appellant's integration in Zambia.

10. At [45] the judge accepted that the Appellant was socially and culturally integrated in the UK.

11. Having found that the Appellant did not meet the requirements of paragraph 399 or 399A of the immigration rules, or s.117C(4) or (5), the judge proceeded to consider, pursuant to paragraph 398 of the immigration rules, whether there were 'very compelling circumstances' over and above those described in paragraphs 399 and 399A capable of outweighing the public interest in the Appellant's deportation. At [48] the judge noted that the Appellant spoke English, and that his private life had been established principally when he was lawfully residing in the UK, this having been granted when he was nearly 14 years old. The judge found however that the Appellant was

not financially independent as he was wholly supported by his mother and there was no documentary evidence confirming that he would be given work as an apprentice plumber.

12. The judge then considered the nature, frequency and seriousness of the Appellant's offending. The judge did not find that the Appellant's oral evidence relating to his criminality demonstrated that he was contrite or accepting of the punishment for his offences. The judge found that the Appellant had not demonstrated insight into his behaviour. At [50] the judge took into account an undated letter addressed to the Respondent that the Appellant claimed was written by his sister, who had better handwriting. This letter was not however adopted by the Appellant and the judge therefore gave it little weight. The judge additionally accorded little weight to various letters of support which were all undated and typed in a similar form, which did not contain statements of truth, and were unsupported by identification documents relating to the authors [51]. At [52] the judge considered a letter of support for the Appellant from his former girlfriend, dated 30 March 2015. Was the judge took into account that the former girlfriend was the victim of harassment for which the Appellant was convicted and sentenced, and indicated that she could not ignore the restraining order which was in place at the date the letter was written, or that the ex-girlfriend did not attend the hearing to give oral evidence. Whilst taking the letter into account the judge gave it little evidential weight given its vintage, the ex-girlfriend status as a former victim of the Appellant's criminality, the existence of the restraining order and the lack of any opportunity to examine the witness as regards the circumstances in which the statement was given.

13. The judge considered the evidence from the Appellant's sister and his 2 friends [54] but gave a number of reasons for concluding that the friends were not familiar with the extent of the Appellant's criminality. The judge considered that the Appellant may be at low risk of repeating the offences or causing serious harm, and took into account that his absence will have a detrimental impact on his minor siblings. The judge specifically made their interests a primary consideration but was unable, given the considerable weight to be given to the deportation of foreign criminals, to conclude that those interests outweighed the public interest in the Appellant's deportation. The judge therefore concluded, at [58] that there were no exceptional or compelling circumstances in the Appellant's case. The appeal was dismissed.

The grounds of appeal and the grant of permission

14. The grounds contend that the judge erred in not accepting that the Appellant had been lawfully resident in the UK for most of his life. The grounds note that the entire period of overstaying occurred when the Appellant was a child. As such, the fact that the Appellant remained after his leave expired could not lawfully be held against him. This contention was said to be supported by the decision in *Kaur*

(children's best interests / public interest interface) [2017] UKUT 00014 (IAC). It was submitted, especially in light of the case of *Azimi-Moayed and others (decisions affecting children; onward appeals)* [2013] UKUT 00197 (IAC), that the childhood years spent by the Appellant as an overstayer ought to have been disregarded when assessing the case under s.117C(4)(a). The grounds additionally submit that the judge's finding that the Appellant may have wider family in Zambia was speculative. The grounds further contend that the judge erred in law in concluding that the Appellant was not financially independent as the financial issues raised by s.117B were intended to address the concerns that such individuals do not become a burden on the state and the Appellant was supported financially by his mother. The grounds finally contend that the judge was not entitled to give little weight on the undated letter written by his sister, and that the judge was not entitled to accord little weight to the letter from his former girlfriend because this ignored the fact that, despite being the victim of his harassment, she continued to support him.

15. Permission was granted by Upper Tribunal judge Frances on the basis that it was arguable that the judge erred in law in his assessment of paragraph 399A and s.117C(4) with respect to the Appellant's period of unlawful residents from the age of 4 to 14. Permission was granted on all grounds.

Submissions at the error of law hearing

16. Mr Gajjar relied on the grounds of appeal and, although accepting that the Appellants did not have leave to remain between December 1995 and 2006, submitted that this did not prevent him from meeting the requirements of s.117C(4)(a) and paragraph 399A(a). It was submitted that the words "most of his life" should be construed having regard to the Appellants minority when he was an overstayer and that any period of illegal residents should be disregarded until the Appellant became an adult. Mr Gajjar then submitted that the judge failed to have regard to the reasons for the Appellant's overstaying in her overall proportionality assessment, which was a mitigating factor, and that such failure amounted to a material legal error. This was said to be a 'Robinson' obvious point.

17. Mr Kotas submitted that the grounds misconstrued the case of *Kaur*, which did not concern a deportation, and that the judge was correct to find, as a matter of fact, that the Appellant had not been lawfully in the UK for most of his life. It was further submitted that the judge was entitled to find that the Appellant was likely to have wider family members in Zambia. Mr Kotas submitted that the grounds did not challenge the judge's proportionality assessment outside of the immigration rules and that permission had not been granted on this basis.

Discussion

18. It is not in dispute that the Appellant lawfully entered the UK in May 1995 as a 4-year-old visitor, and that he was residing without lawful

leave from about December 1995 until he was granted ILR on 6 January 2006. The Appellant lived in Zambia until the age of 4. At the date of the First-tier Tribunal hearing the Appellant was 25 years old. At [43] the judge concluded that, although the Appellant entered the UK lawfully as a visitor and had ILR for about 10 years, he had not been lawfully resident in the UK for most of his life.

19. Paragraph 399A states,

> 'This paragraph applies where paragraph 398(b) or (c) applies if -
>
> (a) The person has been lawfully resident in the UK for most of his life; and
>
> (b) He is socially and culturally integrated in the UK; and
>
> (c) There would be very significant obstacles to his integration into the country to which it is proposed he is deported.'

S.117C(4) is substantially similar terms.

20. Having regard to the principles enunciated in *Mahad v ECO* [2010] 1 WLR 48 and having considered the natural language of the rule construed against the relevant background, I cannot accept the Appellant's submission that periods of unlawful residence as a child can be disregarded for the purposes of paragraph 399A(a). The natural meaning of the rule clear. In order to avail oneself of the exception in paragraph 399A a person must have lawfully resided in the UK for most of his life. The construction of s.117C(4)(a) is equally clear. Had Parliament intended that unlawful residence as a child be disregarded from consideration then it would have expressly said so. The section does not distinguish between unlawful residence as a child and an adult. The core requirement is that the individual must have spent 'most' of their life in the UK with lawful residence. On no rational view could the Appellant be said to have been lawfully resident for most of his life.

21. This is not to suggest that unlawful residence as a child is an irrelevant factor. The fact that an individual may have been in the UK unlawfully as a child is clearly a factor to take into account in the overall proportionality assessment. A child has no control or influence over their immigration status and will usually be entirely dependent on the actions of their parent or guardian. They are not at fault for entering or remaining in the UK without leave. The child should not be made to suffer for the misconduct of their parent. But this is a matter that will come into play when considering whether there are very compelling circumstances where the exceptions are not met.

22. Mr Gajjar submitted that the judge failed to take into account the Appellant's unlawful presence in the UK when he was a child, and that this should have been considered in her overall proportionality assessment. The judge was however aware that the Appellant entered the UK as a 4 year old, and that he was granted ILR when aged nearly 14 ([43] and [48]). The decision, read 'in the round', indicates that the

FtJ has fully taken into account the Appellant's minority when he was unlawfully resident.

23. The judge was, in any event, fully entitled to conclude that the Appellant did not meet the requirements of paragraph 399A(c), which are also reflected in s.117C(4)(c). at [44] the judge gave detailed and cogent reasons for concluding that there were no very significant obstacles to the Appellant's integration in Zambia. This included the fact that the Appellant is a national of Zambia and has a current passport which would allow him to enter the country, that English is spoken in Zambia, that he is a healthy adult, that he has vocational qualifications which he could use to find work in the country, that he could continue to communicate with his friends and relatives in the UK, and that his mother would be able to provide him with support, at least in the short term, while the Appellant obtains accommodation and the means to support himself. The only challenge to this conclusion was that the judge engaged in undue speculation in finding that there were likely to be wider family members in Zambia with whom he could make contact. I am not persuaded that this finding was unduly speculative. The Appellant's parents lived in Zambia all their lives and the judge was rationally entitled to find that there were likely to be wider family members with whom he could contact. But even if the judge was not entitled to this particular finding, in light of the other reasons she gave for concluding that the Appellant could return to Zambia, any error would not have been material and could not, on any rational view, undermine her ultimate conclusion. Having found that there were no very significant obstacle to the Appellant's integration in Zambia, he could not meet the requirements of paragraph 399A or Exception 1 in s.117C(4).

24. The grounds additionally contend that the judge misdirected herself in finding that the Appellant was not financially independent because he was wholly reliant on his mother. Although one of the justifications for being financially independent is because such persons are not a burden on taxpayers, another justification is that, if they are financially independent, they are better able to integrate into society. This puts the focus squarely on the individual as opposed to other family members who may be able to support that individual without any recourse to public funds. This is reflected in s.117B(3)(b). The interpretation advanced by the Appellant has, in aby event, been roundly rejected by the Court of Appeal in *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803. At [63] Lord Justice Sales stated that 'financially independent' is "… an ordinary English phrase, and the FTT gave it its natural meaning, as indicating someone who is financially independent of others. This is the correct interpretation." And at pparagraph 65 Lord Justice Sales stated, "I do not accept Mr Southey's proposed alternative construction of "financially independent", which in effect involved an attempt to introduce an unwarranted gloss to make it mean "financially independent of the state". That is not the natural meaning of the

phrase. Moreover, if the phrase meant "financially independent of the state", the stated reason why this is desirable – "because such persons … are not a burden on taxpayers" – would be close to being tautological and redundant."

25. Mr Gajjar did not advance or develop the grounds contending that the judge was not lawfully entitled to attach little weight to the letter allegedly written by the Appellant's sister, or the letter from his former girlfriend. I am satisfied, in any event, that the judge gave cogent and compelling reasons for attaching little weight to both documents. The letter said to be written by the Appellant's sister was undated and was not formally adopted by the Appellant in his evidence. The judge attached little weight to the former girl-friends letter because it was written in March 2015, the former girlfriend status was the victim of the Appellant's criminality, the existence of the restraining order and the lack of any opportunity to examine her in respect of the circumstances in which the statement was given. The approach adopted by the judge discloses no error of law.

26. Having carefully considered the determination the judge has not, in my judgement, committed any material legal error.

Notice of Decision

The First-tier Tribunal's decision contains no material error of law.

The appeal is dismissed.

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

Unless and until a Tribunal or court directs otherwise, the Appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

4 October 2017

Signed Date

Upper Tribunal Judge Blum