**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/10118/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
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| **On 28 November 2017** | **On 10 January 2018** |

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

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

Appellant

**and**

**SAMSON ABIOLA JAGUN**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mrs Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mr Jacobs

**DECISION AND REASONS**

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, Samson Abiola Jagun, was born on 3 November 1980 and he appeals against the decision of the respondent dated 7 April 2016 to make an automatic deportation order against him under the UK Borders Act 2007, Section 32(5). The First-tier Tribunal (Judge Hodgkinson) in a decision promulgated on 17 February 2017 allowed the appeal on Article 8 grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appellant was convicted following a not guilty plea of offences of fraud at Gloucester Crown Court in April 2012. He had previous convictions, the details of which appear at [11] of the First-tier Tribunal Judge's decision. The appellant has a genuine and subsisting relationship (which is not disputed by the Secretary of State) with K-A, who is also a Jamaican citizen and who has indefinite leave to remain in the United Kingdom. The appellant, who claims to have entered the United Kingdom as a visitor in 1998 and remained without leave, commenced a relationship with K-A in or around 2002 and the couple have three children who are all British citizens; S1, S2 and S3. Judge Hodgkinson found that it would be unduly harsh for the children to live in Nigeria and for the children to live in the United Kingdom without the appellant [63]. In reaching that decision, he had regard to HC 395 (as amended), in particular paragraphs 399(a) and (b) and 399A.

3. The Secretary of State relies upon the decision of *AJ (Zimbabwe)* [2016] EWCA Civ 1012, in particular [17]:

> These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.

4. Mrs Fijiwala, who appeared for the Secretary of State, acknowledged that the court in *AJ (Zimbabwe)* was considering an earlier version of paragraph 399(a) which required that no other adult was available in the United Kingdom to look after a child in the event that an individual was deported; that provision has now been dropped. However, she argued that the principle in the case remained the same, namely that the best interests of

the children and their understandable wish to remain living with both parents were simply insufficient to justify a grant of leave under Article 8 ECHR; something additional had to be present which would establish a "very compelling justification" for an overriding the "high public interest concerned with deportation".

5. Both parties accept that the appellant has a genuine and subsisting relationship with K-A and the children. Granting permission, Judge O'Connor wrote:

> It is arguable that there is an absence of law for reasoning capable of supporting the FtT's conclusion [63] that it would be unduly harsh for the children to live in the UK and that the appellant, particularly in light of the earlier conclusion [46] (albeit one not determinative of the aforementioned issue) that the evidence falls short of establishing that the appellant's absence would be disastrous for the children.

6. The grant of permission needs to be put in the context of the judge's decision. At [46], Judge Hodgkinson wrote:

> In terms of what is in the best interests of the children, the available evidence most clearly establishes that it is in the best interests of all the children for the appellant to remain in the United Kingdom, living in the household in which the entire family unit resides. Such is, I find, a longstanding arrangement and a relatively stable one. The evidence before me falls short of indicating that the appellant's absence would be *disastrous* for the children, despite Miss Smith's [the social worker who gave evidence in the case] suggestion otherwise, but his continued presence in their lives, on a daily basis, is most clearly in their interests. Of course, their interests are a primary and very weighty consideration. Having concluded this thus, I proceed to consider other issues of relevance to Article 8 and to my assessment of proportionality.

7. If Judge O'Connor's grant of permission may be taken as some indication of a possible inconsistency in the judge's reasoning, I find that none exists on this particular point. The judge has found it would be unduly harsh for the children to be separated from the appellant but I find that the judge has not been inconsistent in finding that the social worker had overstated the case by saying that the separation would for the children be "disastrous". In other words, a result may be legitimately described as unduly harsh whilst it is not "disastrous". To that extent, nothing turns on the judge's observation regarding the social worker evidence.

8. Mr Jacobs sought to persuade me that the judge's analysis referred to circumstances which were manifestly out of the ordinary and which provide evidence of the sort of factors which the Court of Appeal indicated in *AJ (Zimbabwe)* should exist for an appeal to succeed. These include the behaviour problems [45] of two of the children, the fact that the index offences took place in 2009 and the indication in the evidence that the appellant has reformed. Mr Jacobs also referred to the Secretary of State's delay in seeking to deport the appellant although he acknowledged that that delay could not be determinative.

9. The question on which this appeal turns, therefore, is whether the judge has done enough to show that there would be unduly harsh consequences for the children if they were to be separated from the appellant. I consider that Mrs Fijiwala is correct to say that, although *AJ (Zimbabwe)* dealt with an earlier version of the Immigration Rule, the principle enunciated in *AJ (Zimbabwe)* remains valid.

10. I do not dispute the judge's finding at [58] that to argue that the entire family should uproot itself and return to Nigeria together is a contention "wholly lacking in merit". Indeed, Mrs Fijiwala did not seek to persuade me otherwise. The crux of the decision, therefore, is what the judge says regarding the consequences of separating the children (who will remain in the United Kingdom with K-A) from the appellant who will be deported to Nigeria. That analysis appears at [60–63]. Interestingly, the first point raised by the judge in addressing paragraph 399(a) is that the appellant "has not lived in Nigeria for approaching eighteen years, since he was a teenager. He has nobody to support him there and no immediate means of financial support there. He has no accommodation there". As *AJ (Zimbabwe)* shows, commonplace inconveniences resulting from deportation are not enough. The appellant is a resourceful man in apparently good health. None of the circumstances at [60] are capable of being properly described as additional factors over and above the ordinary. If they played a part in the judge's decision that the separation of the family would be unduly harsh then, in my opinion, they should not have done so; they may be serious potential inconveniences but they are nothing more than that. At [61], the judge moves on to consider the fact that the appellant "clearly holds a primary care function in relation to the children and there is clearly a significant bond and interdependence between him, the children and K-A". Here, the judge is describing nothing more than the maintenance of a "close and immediate relationship with the deported parent" such as is described by the Court of Appeal in *AJ (Zimbabwe)* at [17]. The Court of Appeal has held that a "close and immediate relationship" between a parent to be deported and his children in the United Kingdom will not be enough to justify his remaining in the country. I take that relationship to include those activities and duties as a parent which would naturally flow from a "close and immediate relationship" such as "holding a primary care function", as described by Judge Hodgkinson. Likewise, it is difficult to see how a "significant bond of interdependence" between the appellant, the children and K-A is anything more than another way of describing a "close and immediate relationship" of the kind considered in *AJ* to be inadequate.

11. At [62] the judge refers again to the best interests of the children and refers also "to the interests of the appellant and the interests of K-A, together with my conclusion regarding his lack of propensity to offend which is linked to the length of time which has elapsed since his last offending". Once again, the judge's analysis is lacking detail. Moreover, none of these factors are out of the ordinary and, as the Court of Appeal observed, "if they were enough to render deportation a disproportionate interference with family life, it would drain the Rule of any practical

significance". The judge goes on to state that "of course, the interests of the children are a primary consideration and I find that the evidence before me falls materially short of establishing that there are any factors, either viewed singularly or cumulatively, which outweigh those interests". But that statement appears to be at odds with the Court of Appeal in *AJ* which observed that, "these cases show that it would be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required even though such separation is detrimental to the child's best interests. That is a commonplace and not a compelling circumstance". I acknowledge that the judge has referred to the appellant's criminal history and to the public interest concerned with deportation. The problem is that he does not appear to agree with the Court of Appeal that, in the vast majority of cases, the best interests of the children will be outweighed by the public interest concerned with deportation of foreign criminals.

12. I fully acknowledge that the First-tier Tribunal is required to carry out a robust assessment of the facts and will exercise its discretion within the margin permitted by law. In many cases, the Upper Tribunal, even when it may, on the same facts, have reached a different decision from the First-tier Tribunal Judge, should refrain from interfering with a conclusion properly reached and supported by cogent reasons. However, I have struggled to identify anything in this case which would lift it beyond the range of commonplace cases which the Court of Appeal has indicated in *AJ (Zimbabwe)* would not give rise to a grant of leave to remain in the United Kingdom. Mrs Fijiwala drew my attention to the recent case of *WZ (China)* [2017] EWCA Civ 795, in particular at [14]:

> 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.

13. I have sought to extract principles of law from that authority; I am not attempting to compare the factual matrices of that case and the present appeal. It is apparent that, when necessary, it is right for the Upper Tribunal to interfere with the conclusions of the First-tier Tribunal where those cannot be supported by a proper application of the law. Whilst I do not suggest at all that Judge Hodgkinson has not produced a thorough and carefully considered decision, ultimately the reasons for the outcome

which he gives at [60–63] cannot lift this case out of the ordinary. I have no doubt that he had sympathy for the children of the appellant, as do I, but, as the Court of Appeal observed in *WZ*, "deportation necessarily results in the break-up of the deportee's family if they remain in this country after his removal". Such a break-up will occur in the vast majority of cases and does not in itself render the separation unduly harsh. Of the factors put forward by Mr Jacobs as exceptional in this case, only, perhaps, the behavioural problems of the children can properly be described as unusual but, in my opinion, even that factor is not enough. A casual observer might think it outrageous that a stable family in which both natural parents share the care of their children should be broken up in this way but that, sadly, is exactly what deportation does.

14. For the reasons I have stated above, I find that Judge Hodgkinson erred in law such that his decision falls to be set aside. I have re-made the decision. I have had regard to the submissions of both representatives as regards the appropriate manner of disposing of this appeal. However, in light of the fact that neither representative indicated that the facts as considered by the First-tier Tribunal have altered or added to in any significant way with the passage of time, I can see no alternative, in the light of what I have said above, than to dismiss the appeal of the appellant against the Secretary of State's decision.

**Notice of Decision**

15. The decision of the First-tier Tribunal which was promulgated on 17 February 2017 is set aside. I have re-made the decision. The appellant's appeal against the decision of the respondent dated 7 April 2016 is dismissed.

16. No anonymity direction is made.

Signed Date 3 January 2018

Upper Tribunal Judge Lane

**TO THE RESPONDENT**
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 3 January 2018

Upper Tribunal Judge Lane