Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number HU/17220/2019 (V)**

THE IMMIGRATION ACTS

Heard by *Skype for Business* **Decision & Reasons Promulgated**
On 31 March 2021 **On 21 April 2021**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JEFF JEPHAT TINASHE SANGO

Respondent

For the Appellant: Mr Tan, Senior Home Office Presenting Officer
For the Respondent: Mr Cox, of Latta & Co, Solicitors

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.

2. The SSHD appeals, on 4 grounds, against the decision of FtT Judge David C Clapham, which at [38] allowed the appellant's appeal because "the public interest in the deportation of foreign criminals" was "outweighed by the circumstances relied upon by the appellant in his human rights appeal".

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3. Part 5A of the 2002 Act directs courts and tribunals on how to deal with article 8 of the ECHR and public interest considerations. Section 117C states additional considerations in cases involving foreign criminals:

> (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
>
> (c) 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.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

4. The appellant was sentenced to 4 ½ years, so it would not have been sufficient to make out one or both exceptions. The correct approach would be to deal with those on the way to considering everything relevant to "very compelling circumstances".

5. Grounds 1 is absence of consideration of section 117C and its case law.

6. Ground 2 is inadequate consideration of the public interest.

7. Ground 3 says that the judge identified 3 points in the appellant's favour: his relationship with his daughter; his length of time in the UK; and the length of time since his release from prison; and that even in combination, those were insufficient. It is also said that absence of enforcement of deportation should not have counted in his favour.

8. Ground 4 is headed "perversity". It begins by saying that the decision "verges on the perverse" but goes on to say that it was "clear that the appellant falls foul of section 117C(6)" and it was "not open to the judge to find otherwise" (in which case, the outcome would have to be reversed).

9. I am obliged to both representatives for their succinct and helpful submissions.

10. Mr Tan's submissions were along the lines of the grounds, although he did not press ground 4. He also suggested that the FtT erred by not giving weight to the determination of the FtT in DA/00415/2013, promulgated on 4 February 2014, dismissing a previous appeal by the appellant.

11. Mr Cox expanded upon his written submissions. He argued that although the judge did not cite the legal tests, he had been directed to them in submissions, and had applied them; he had regard to the public interest and was entitled to find it reduced to the extent that he did; there were matters capable of amounting to very compelling circumstances; the decision was accordingly open to the judge and was not perverse; and any error was not material. As to the previous determination, Mr Cox countered that the point was novel, and late.

12. I reserved my decision.

13. The judge when reaching his conclusions did not mention the previous determination, to which his attention was drawn; but he did record at [30] the submission that circumstances had moved on since 2014 (which might be said to be the nub of the case). Taking account of that, and in absence of any ground of appeal, I detect no error in this respect.

14. The obvious way to approach the decision was in terms of the statutory criteria: (i) were there very significant obstacles to the appellant's integration in Zimbabwe; (ii) would the effect of deportation on his wife or daughter be unduly harsh; and, critically, (iii) were there very compelling circumstances over and above those two matters?

15. Despite Mr Cox's valiant submissions to the contrary, I consider that the judge erred by failing to make that structure overt (ground 1). I accept that a decision should not be set aside for want of legal recitals if the correct test has effectively been applied. The question is whether this was an error of form only, or of substance.

16. Ground 2 is not made out. The judge paid careful attention to the public interest – see [33, 34, and 36].

17. The appellant came from Zimbabwe to the UK in 2000 at the age of 12 and has lived here since then. He has relatives in Zimbabwe. It would be a major and unwelcome change for him to have to integrate there, but it is plain that the judge, without saying so, did not consider that obstacles in his way reached the level of the legal test. The appellant does not appear to have pressed such a contention in the FtT, and he did not do so in the UT. Exception 1 was not made out (it is perhaps unlikely that any judge would have found that it was). However, the extent of any obstacles to integration could still play some part in the ultimate test.

18. From [35] of the decision it is equally plain that the judge did not find exception 2 to be made out in respect of the appellant's wife. Again, that is unsurprising. As to his

daughter, the judge did not say that the effect of deportation on her would be “unduly harsh”, but he found that she would remain here, would “suffer significant consequences” through being deprived of her father’s presence, and that this was a matter on which it was appropriate to “place weight”. The judge should have been explicit in terms of the “unduly harsh” criterion; but in the ultimate test, the consequences for his daughter weighed a great deal.

19. The matters cited by the judge at [33 – 39] in favour of the appellant, as well as his relationship with his daughter, are the reduced weight to be given to the public interest with the passage of time; the length of time the appellant has been in the UK; the change in his personal circumstances; “a real effort to change the direction of his life … trying to be a useful member of society,” low risk of re-offending; and the length of time since his release from prison.

20. While the challenge on grounds of perversity was not abandoned, I do not find that it has been established. I do not accept that the points on which the judge founded were incapable of producing a decision in the appellant’s favour. There was much to weigh on both sides; but the appellant’s circumstances had changed a great deal since he incurred his convictions as a member of a vicious criminal gang, and since the previous determination.

21. Grounds 3 and 4 are not established.

22. I conclude that only ground 1 discloses error, and that on a full reading of the decision, this is a lapse of form rather than of substance.

23. The decision of the First-tier Tribunal shall stand.

24. No anonymity direction has been requested or made.

Hugh Macleman

7 April 2021
UT Judge Macleman

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 <u>in detention</u> 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.