Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07784/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 November 2012	**On 28 March 2013**

Before

THE HON MR JUSTICE N E UNDERHILL
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANTONIO ALFREDO BAZOMBA

Respondent

Representation:

For the Appellant: Mr Saunders, Home Office Presenting Officer
For the Respondent: Mr A Vaughan, Counsel, on behalf of Duncan Lewis & Co

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing an appeal against her decision not to revoke a deportation order. The background facts can be summarised as follows.

2. Mr Bazomba, to whom we will refer as "the appellant" as he was before the Tribunal although he is strictly speaking the respondent before us, is aged 49. He came to this country from Angola on 16 October 2001 with his two young sons. He was joined shortly afterwards by his daughter. Their mother, for reasons which do not appear from the papers, did not accompany him. The children consists of a boy and a girl, Gluar and Jandira, otherwise known as Maria, who are twins and who were born on 26 July 1993 and are according now aged 19, and another boy, Merizel who, was born on 30 September 1998 and is accordingly now aged 14.

3. Once arriving in this country the appellant claimed asylum. That claim was refused, but on an appeal on Article 8 grounds he was granted exceptional leave to remain until 4 March 2004. He subsequently applied for further leave to remain. That was refused, and an appeal was dismissed by the Asylum and Immigration Tribunal in October 2005. He was not, however, removed at that stage; and shortly afterwards he was charged with three counts of child cruelty and one of actual bodily harm relating to his treatment of all three of the children, who had up to that point been living with him. He initially pleaded not guilty but before trial he changed his plea; and in what appears to have been July 2007 he was sentenced to two years' imprisonment on all counts, to run concurrently.

4. Following the completion of his sentence the appellant was detained on immigration grounds, and on 23 November 2007 he was served with a decision to make a deportation order. He appealed. The appeal was dismissed, as was a subsequent application for permission to apply for judicial review. A deportation order was in fact made on 10 June 2008, which the appellant again sought to challenge by way of judicial review, which was again dismissed. During the currency of that challenge on 5 September 2008 he was released on bail. Again the deportation was not implemented forthwith, and on 12 June 2009 the appellant's solicitors submitted further representations which were treated as an application to revoke the deportation order under paragraph 390 of the Immigration Rules. A decision to refuse to revoke that order was not made until 12 September 2011, supplemented by further reasons on 14 November 2011. That is the decision which was the subject of the appeal to the First-tier Tribunal.

5. We should say something more about the facts of the offences which led to the making of the deportation order. The principal source of information is the sentencing remarks of His Honour Judge Zeidman QC in the Snaresbrook Crown Court, which are fortunately very full. It appears that on a number of occasions over the four or five years from shortly after the appellant's arrival in this country he beat all three of the children, although particular attention seems to have been placed on the offences against Jandira, his daughter, who was aged no more than 11 or 12 or even younger. The assaults appear to have been precipitated by the ordinary incidents of family life. The children would be slapped, kicked, punched and on at least one occasion hit with a wooden ruler, although there appears to have been no case of serious injury. These were not instances of considered acts of corporal punishment but were the result of a loss of temper and loss of control. The judge did, however, identify a number of mitigating circumstances, essentially focusing on

the great stress which the appellant was under bringing up three small children as a single father in a strange country in circumstances where his immigration status was precarious. When the offences came to light the children were taken into care, but they were eventually permitted to be looked after by a cousin of the appellant in Manchester, Ms Nduli, as a special guardian.

6. The appellant's appeal to the Tribunal was based squarely on the contention that his deportation would be in breach of the Article 8 rights of himself and his family, the latter of course being equally important – see Beoku-Betts [2009] AC 115. The matters on which he relied in support of his claim to have a family and personal life in the UK can be summarised as follows. He has of course been present in the country since 2001, although not with leave to remain for all of that period; but his focus was entirely on the period since his release in 2008. Since that time he has formed a stable relationship with a British citizen of Congolese origin, Ms Minganu. They were married on 8 August 2009 by traditional rites. They have not been through a legal marriage, but there is no suggestion that the relationship is not a stable one and I will for convenience refer to them as husband and wife. They live together in north London. The appellant does not, as we understand it, himself have a job, but Ms Minganu has a full-time job working with children as an assistant carer at a primary school. They are trying for a baby. He has developed a strong religious faith, and as a result of the influence both of his faith and of the counselling which he received in prison he is, he says, a changed person, now leading a constructive life closely involved with his church and with the Angolan community in London. Most importantly, the three children who were the victims of his earlier offences have all forgiven him and are in a full family relationship with him. The two elder children live in Manchester but they speak to him very frequently and also visit regularly. The younger son, Merizel, was hoping to come to live with him in London, and arrangements were being made to arrange for him to go to school in Islington.

7. The appellant himself, Ms Minganu and the two elder children, Gluar and Jandira, appeared as witnesses before the Tribunal, and both in their witness statements and in their oral evidence, which plainly impressed the Tribunal, confirmed his account of the revived family relationship. There was also a supportive statement from the special guardian, Ms Nduli. It was the appellant's case that the family relationships now in place could not be maintained if he were deported to Angola. Ms Minganu was not herself from Angola and could not speak Portuguese. She would in any event not want to leave her job. He himself has no family in Angola. Still less would the children wish to accompany him there. It was also the appellant's case, though it may be debatable whether this was strictly material to the claim under Article 8, that he is HIV positive and receiving regular treatment.

8. We have to say that the Tribunal's determination is not very satisfactory in its expression, not simply because of several inaccuracies (the most serious of which is confusing the names of the children) but because the concluding paragraphs which contain its reasoning have no clear structure. So far as the law is concerned, the Tribunal's self-direction has to be pieced together from a number of references. It does set out in full the terms of paragraph 390 of the Immigration Rules. It also

makes several references to Article 8, describing it as requiring a "proportionality balancing act". Specifically in connection with Merizel, who is of course still a child, it refers to ZH (Tanzania) [2011] 2 AC 166 and to Section 55 of the Borders, Citizenship and Immigration Act 2009, although there is no specific consideration of how Merizel's interests would be affected by his father's deportation. As regards how the balance is to be struck in cases involving deportation of foreign criminals, the Tribunal refers to the decision of the Grand Chamber of the European Court of Human Rights in Uner v The Netherlands (2007) 45 EHRR 14, although it refers to no particular passages from that decision.

9. Purporting to strike the relevant balance, the Tribunal explicitly accepted the evidence of the appellant and his family about the strength of the relationships now formed and in particular of his renewed relationship with his children. It was particularly struck by the evidence of Jandira (although it referred to her as Merizel). It said:

> "His twin, now adult, children Merizel and Gluar, appreciated that, horrendous though it was, [the offending] happened in the past some seven years ago and in his son's words it was in the past and they have forgiven him. He is a good father. Merizel the victim added the family can now move on as our father has changed and they are supportive of him now he faces deportation and also regard his partner as a loving stepmother and supporting wife to him."

The Tribunal further observed

> "There has been a considered plan to facilitate the establishment of contact between the children and their father. If he were to be removed to Angola this re–established relationship would be severed and the children, some of whom were victims of his criminal abuse would be punished again."

It also took into account the length of time that the appellant had been in the country, the impossibility of Ms Minganu, his wife, accompanying him to Angola and the absence of any family in Angola. It considered the seriousness of the offending behaviour, describing it as very serious and the appellant as having imposed a cruel regime on his children over four or five years; but it picked up the references made by His Honour Judge Zeidman to the mitigating circumstances, particularly the difficulties that the appellant faced as a single father. It emphasised that offences of that character were never likely to be committed again and that there was no evidence of any other offending behave or of criminal propensities. It clearly accepted the evidence that he was a changed person.

10. The Tribunal concluded:

> "We are satisfied that deportation would violate his right to respect to both his family and private life as provided for in Article 8 of the ECHR. This would not be limited nor do we believe that any expulsion would pursue the aims of public safety or protection of the rights of others. There is nothing to suggest that he poses a risk to the pubic at large or to children in particular now that he

> is a reformed character. We reject the Secretary of State's assertion that his deportation is necessary in a democratic society. We remind ourselves of the fundamental principles of establishing the European courts case law and the factors summarised in Uner CG 46410/99. It follows from everything that we have said and considered having given this case the most anxious scrutiny looking at in the round independently that the appellant's deportation from the United Kingdom will be disproportionate to the legitimate aim of the prevention of disorder and crime and therefore would not be necessary in a democratic society. There consequently would be a violation of Article 8 of the Convention if this appellant was to be deported to Angola. In this respect we have taken into account the criteria as set out above for revocation cases [that is plainly a reference to paragraph 390 of the Rules] and find that he has satisfied the criteria with cogent and relevant evidence on which we place considerable weight in this proportionality/balancing exercise in our consideration of Article 8."

11. Mr Saunders for the Secretary of State advances two grounds of appeal, which we will take in turn.

12. The first is that the Tribunal showed in its determination no real awareness of the important public interest in deporting foreign criminals, particularly those convicted of serious offences. As originally pleaded, that point was made by reference to the recent decision of the Court of Appeal in Gurung [2012] EWCA Civ 62. Put that way, the point is bad because Gurung was concerned with the provisions of sections 32 and 33 of the United Kingdom Borders Act 2007. However we accept that the underlying point remains. It is always necessary that a Tribunal considering deportation of foreign criminals should give full weight to the public interest not only by way of public protection but also on the wider grounds referred to in such cases as N (Kenya). We agree with Mr Saunders that the references to that factor in the Tribunal's reasons are not very prominent, and it would have been better if the judge had acknowledged it more explicitly. Nevertheless it seems to us plain that it had these factors well in mind. The Tribunal referred in terms, in the passage which we have quoted, to "the legitimate aim of the prevention of disorder and crime" and also to the aims of public safety for the protection of the rights of others. As we have said, it described in some detail the circumstances of the appellant's offending in a way which made it clear that it was well aware of what had to go into the other pan in the so called proportionality balance. It was no doubt because it was the Article 8 side of the scale that was the more controversial, and to which the evidence had mostly been directed, that received more prominence in the expressed reasons. It is also material to note that the Secretary of State at paragraph 65 of her letter expressing her refusal to revoke the deportation order did not herself expatiate on N (Kenya) or the importance of deterrence or other matters. She simply said "It is believed your client's removal is proportionate in pursuit of that legitimate aim of preventing disorder, crime and maintaining effective immigration control." It is that formulation of preventing disorder and crime which the Tribunal specifically addressed in the passage quoted.

13. Mr Saunders's other ground is that there was no real evidence that the appellant had developed a family life with his children. The relationship had been broken when they were taken away from him as a result of his offending and it had not really resumed: despite the reconciliation, they remained living with their cousin in Manchester. Such evidence as there was for example of the intention that Merizel come to live in London and go to school there, was prospective only.

14. There are two answers to that point. The first is that we believe that it understates the extent of the contact which had occurred and the relationships which had already developed as shown in the evidence. The evidence was that the children had already spent a good deal of time with their father and stepmother, and both their witness statements and their oral evidence testified to the warmth of the relationship and its importance to them. How much weight to give to that was a matter for the assessment of the Tribunal, and we can see no error of law in the approach which it took. We would add that the right to respect for family and private life protected by Article 8 applies to relationships in their early stages, as long as they are of sufficient importance for Article 8 to be engaged, as much as to long-established relationships, and it is recognised that part of what Article 8 protects is the opportunity for relationships to develop and be nurtured over time.

15. The second answer is that the relationship of the appellant and his children was not the only aspect of his family and private life on which he relied. There was also his marriage. He was married to a British citizen, and the Tribunal found in terms that it would not be reasonable to expect his wife to return to live with him in Angola. Mr Saunders submitted that that part of the Tribunal's determination was inadequately reasoned, but we cannot agree. It said at paragraph 23

> "She was not in a position to return to Angola because she is not from their country, the Congo, and in any event is now a British citizen full-time employment as an assistant carer at the school in north London." We do not think that it was necessary to say any more than to develop those points any further: their weight was self-evident.

16. For those reasons we dismiss this appeal.

Signed Date: 28th March 2013

The Hon Mr Justice N E Underhill
Sitting as Judge of the Upper Tribunal