Case No. C5/2013/2241

**Neutral Citation Number: [2015] EWCA Civ 1613**
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Thursday, 26 February 2015

**B e f o r e:**

**LORD JUSTICE ELIAS**

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**Between:**
**LB (DEMOCRATIC REPUBLIC OF CONGO)**

**Appellant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

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DAR Transcript of the Stenograph Notes of
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**Mr A Khan** (instructed by Harding Mitchell Solicitors) appeared on behalf of the **Appellant**
**The Respondent** did not appear and was not represented

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J U D G M E N T (Approved)

1. **LORD JUSTICE ELIAS:** This is undoubtedly a hard case. The Appellant entered the UK in 2003. He applied for and was refused asylum. He did not leave the UK.

2. He admitted to using a false passport in 2004. In 2008, he obtained a false passport using a Belgian ID document. He was arrested in 2009 and was charged with an offence of essentially acquiring and using false identification documents. He pleaded guilty and was sentenced to 12 months imprisonment.

3. By then, he was married and in a genuine and subsisting marriage. His wife had indefinite leave to remain in the UK. They have four young children. There is a fifth who is a stepchild who has indefinite leave to remain.

4. The appeal now relates to a decision to deport the Appellant in consequence of his criminal offending.

5. There is no doubt that under the relevant Immigration Rules he has no right to remain in this country unless he can bring himself within the terms of Immigration Rule 398 which effectively provides that the deportation of somebody who has committed a criminal offence of this kind is assumed to be conducive to the public good and will not infringe Article 8 rights unless there are "exceptional circumstances the public interest in deportation will be outweighed by other factors".

6. That rule was considered in MF (Nigeria) by this court. The Master of the Rolls in giving judgment indicated that the Rules constituted a complete code. When applying the exceptional circumstances test, the court had to, in a balancing exercise, apply the principles as required by Article 8 of the Strasbourg jurisprudence.

7. In so holding, the court departed from the Upper Tribunal approach which was to say that the Rules were not exhaustive, that the exceptional circumstances criterion in the rule did not embrace all Article 8 considerations and that there had to be separate and distinct consideration of Article 8 rights if the exceptional circumstances provisions was felt to be inapplicable.

8. Paragraph 45 of MF, the Master of the Rolls pointed out that either way the result should be the same and it was "a sterile question whether this is required by the new Rules or it is a requirement of the general law."

9. In this case, the First-tier Tribunal was very conscious that the interests of these children would be best served by allowing the father to remain. It was also accepted that it was not reasonable to expect them or the wife to follow him to the Congo. It followed that there was going to be effectively a severing of the relationship as a result of deportation. That is undoubtedly obviously detrimental to these children.

10. But the Tribunal went onto find that in all the circumstances, this was not an exceptional case in the sense that it compelled the Tribunal not to implement the Rules in the usual way. They did so partly because the relationship between husband and wife had been a precarious one when it was entered into. They recognised that was not, of course, the fault of the children, but nevertheless it had some bearing on the issue.

11. They held that the risk of re-offending was more than simply fanciful. As they put it, there had been a "substantial package of troubling behaviour". They came they came to the conclusion that these were not circumstances where it would be a disproportionate interference with Article 8.

12. The case went to the Upper Tribunal. Essentially, they noted that the heart of the appeal was balancing the interests of the children and the partner on the one hand and the criminal activity of the Appellant on the other.

13. The Upper Tribunal concluded that it was not a perverse conclusion reached by the First-tier Tribunal. They had approached matters the right way. They had recognised the interests of the children was a principle, although not the overriding, consideration. That it was not a perverse conclusion, so they upheld the decision.

14. The appeal to this court was rejected on paper by Sullivan LJ essentially on the grounds that these were fact-sensitive decisions. There was no error in the approach of the First-tier Tribunal. It could not be said that this was an exceptional case that compelled a different answer. Indeed, he said that these kinds of problems, admittedly not generally with five children but quite often one or more children, are frequently found when there is deportation of someone for criminal activity. It would, in my words, drive a coach and horses through the Rules if the adverse effect on the children were to always constitute a compelling circumstance requiring a different outcome.

15. In that context, I note that Rule 399 specifically deals with the relationships between parents and children. It provides that there should not be deportation in very narrow and exceptional circumstances. Whilst there may be compelling circumstances over and above that, that is the starting point through which the Tribunal has to approach these issues.

16. I think there is simply no prospect of persuading the court that the Tribunal could not, in the circumstances and properly applying the principles, come to any different conclusion.

17. Mr Khan has advanced his case before me this morning strongly and perfectly properly. He has made a number of points. The first I have dealt with, which is essentially to say that the interests of the children could not have been given sufficient weight.

18. He adds that the sentence has been served and rehabilitation has been completed, but it is well established that is by no means an answer to cases of criminal offending, particularly in circumstances where the risk of re-offending is realistic and not merely fanciful, as the Tribunal found. I do not think it can be said that it is an irrational decision.

19. Mr Khan advanced two further arguments, which were necessary in particular to show that he had satisfied the second appeals test. That is to show that there is a point of principle or practice or other compelling reason for the appeal to go forward.

20. First, he rightly points out that the Upper Tribunal in analysing the case had approached the matter on the basis of the decision of the Upper Tribunal in MF (Nigeria) and their decision was in turn overturned by the Court of Appeal.

21. But as paragraph 45 of the decision of the Master of the Rolls in MF makes clear, and I have referred to it already, that is not a material distinction. The Upper Tribunal was applying the proportionality principles which Strasbourg requires when Article 8 matters are under consideration. Those are precisely the same considerations which would have to be weighed when construing the concept of exceptional circumstances under Rule 398.

22. A further point advanced is that the Tribunal did not have regard to Article 24 of the European Charter of Fundamental Rights. That is headed "rights of the child" and paragraph 2 says:

> "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

23. That is already the approach taken in English law in any event as a result of the decision of the House of Lords in HZ (Nigeria).

24. But there are two additional problems, it seems to me, with that provision. First, I have to say I have severe doubts whether it is strictly applicable in a case of this kind. Mr Khan says it is because the relevant rules were giving effect to a European directive, but it does not follow that there is a European right in issue here. The father was not a European citizen and was not being deported to another European country.

25. But even if I am wrong about that and even if it can be said that Article 24 does in some way extend beyond the reach of the current rule as expressed by the House of Lords in the HZ case, I think there is the additional problem that the issue was not raised below.

26. This is not a simple point of law which would be decisive. I can understand how it might be appropriate for such a point to be considered even if it had not been raised below, but the thrust of the argument is that this might give greater weight to the children's interests than would otherwise be the case and therefore could effect the exercise of the discretion. But I do not see that this court could properly exercise the discretion afresh even if it were to find that EU law was engaged and that Article 24 went further than the current jurisprudence.

27. That is, in my view, far too speculative a basis on which to allow this new point to be argued for the first time. I believe I am right in saying it has only been raised for the first time since the order of Sullivan LJ refusing these grounds on paper.

28. I respect Mr Khan's ingenuity in finding it and bringing it to the attention of the court, but I am afraid I am against him on allowing that to constitute a compelling reason or otherwise raising a point of principle or practice which would be appropriate for this court to consider in this context.

29. So for those reasons, I am afraid I have taken longer than I should have this morning. Out of deference to the obvious concern of the parties in this case and the careful submissions of Mr Khan, I have said a bit more than I would usually in an application of this kind, but I reject the application.