Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00098/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 May 2014	**On 12 May 2014**

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE O'CONNOR

Between

F C
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Short, instructed by Hammersmith & Fulham Community Law Centre
For the Respondent: Mr Whitwell, Senior Presenting Officer

DETERMINATION AND REASONS

1. The First-tier Tribunal made an Anonymity Direction granting the Appellant anonymity throughout these proceedings. No application has been made to discharge this Direction and we conclude that it should be maintained. As such no report of these proceedings shall directly or indirectly identify the Appellant. Failure to comply with this direction could lead to a contempt of court.

2. The Appellant is a citizen of Zimbabwe born 25 November 1955. She entered the United Kingdom on 4 May 2002 in possession of a six month

visitor visa in the false name of M M. She subsequently successfully applied for leave to remain as a student and thereafter obtained numerous further extensions of her leave, all in this false name. The last such extension was granted so as to expire on 30 April 2007. Thereafter, the Appellant's leave was statutorily extended whilst the Secretary of State considered a further application made by her, this time for leave to remain as a work permit holder. This application was refused on 10 August 2007.

3. On 7 May 2008 the Appellant was arrested for working illegally, at which time she made an asylum application in the name of M M. This application was refused and a decision was made to remove her to Zimbabwe on 5 November 2008. The Appellant appealed this decision to the Asylum and Immigration Tribunal on Refugee Convention, Humanitarian Protection and Article 3 ECHR grounds.

4. The appeal was dismissed by Immigration Judge Turkington in a determination promulgated on 6 January 2009. When doing so the judge comprehensively rejected the truth of evidence given by the Appellant, save for that relating to her name, age, nationality and gender. In particular, the judge did not accept that the Appellant, or any of her family members, had had any involvement in MDC activities in Zimbabwe, or that she, or any members of her family, had ever been targeted by pro-government activists in her homeland.

5. On 23 January 2009 the Appellant pleaded guilty to three counts of possession of false identity documents with the intent of using them for establishing registerable facts about herself. She was sentenced at Portsmouth Crown Court to 12 months imprisonment on each count to run concurrently.

6. The Appellant suffered a mini heart attack in 2009 and in 2010 she suffered a stroke.

7. On 13 December 2012 the Respondent served the Appellant with:

   (i) a decision that Section 32(5) of the UK Borders Act 2007 applies to her; and

   (ii) a signed deportation order drawn in her name.

   The Appellant appealed the former decision to the First-tier Tribunal. That appeal was dismissed by a panel [Judge Thanki and Ms Street JP (non-legal member) – "*the Panel*"] in a determination promulgated on 25 February 2014. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge McDade on 18 March 2014, and thus the appeal comes before us.

8. Before the panel of the First-tier Tribunal ("the Panel") the Appellant relied, in her asylum and Article 3 claims, on ostensibly the same factual matrix as she had previously relied upon before the Asylum and Immigration Tribunal in 2009, with an additional limb that she would be at risk upon

return to Zimbabwe as a consequence of having undertaken activities on behalf of the MDC in the United Kingdom.

9. In relation to her circumstances in Zimbabwe prior to coming to the United Kingdom, the evidence about which Judge Turkington comprehensively disbelieved in 2009; the Appellant sought to rely on new evidence not available to Judge Turkington in order to persuade the Panel to come to a different conclusion as to the truthfulness of her assertions. This, though, was to no avail because the Panel took exactly the same view of the Appellant's credibility as had Judge Turkington. The process by which it did so is now the subject of challenge before us.

10. Before turning to the specific challenges made by the Appellant, it is prudent to set out the binding guidance given by the Tribunal in the starred determination of Devaseelan [2004] UKIAT 00282; a decision which has been widely approved of by the Court of Appeal.

11. Devaseelan concerned a second appeal made on human rights grounds by an asylum seeker whose asylum appeal had been previously dismissed. The IAT gave guidance as to the weight to be attached to the findings of the Adjudicator who had rejected the asylum appeal. It is not in dispute that this guidance is of application in the instant appeal. Insofar as is relevant, the IAT said as follows in paragraphs 39 to 42 of its decision:

    (1) The first Adjudicator's determination should always be the starting point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

    (2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.

    (3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.

    (4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility ... for this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.

    (5) Evidence of other facts – for example country guidance – may not suffer from the same concerns as to credibility, but should be treated with caution.

    (6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and

> proposes to support the claim by what is in essence the same evidence as available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated ...
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> (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be as it were held against him. We think such reasons will be rare."

12. Turning back to the grounds of challenge, it is submitted that the Panel erred in its consideration of the evidence given by (i) Professor Katona, a consultant psychiatrist, in a report dated 22 January 2014; and (ii) Ms Mercy Mwakipeseli.

13. Taking these in turn, the Panel summarised Professor Katona's evidence in paragraphs 26 to 30 of its determination. It accepted Professor Katona's expertise [26], but also observed in the same paragraph that the letter of instruction to the Professor had not been provided to the Tribunal.

14. Professor Katona diagnosed the Appellant as having complex post-traumatic stress disorder ("PTSD") and depression, caused by her traumatic experiences in Zimbabwe. Specific consideration was given to whether the Appellant could have feigned the symptoms and it was concluded she could not. It was further concluded that the illness provided an explanation *"for the apparent omissions and inconsistencies in the Appellant's asylum interviews*".

15. Having observed that Professor Katona's conclusions were based entirely on the history provided by the Appellant [27] the Panel said as follows:

> "[33] It is submitted on behalf of the Appellant that the diagnosis of PTSD by Professor Katona is significant new information which was not before the previous appeal hearing. We accept that the diagnosis of PTSD is made for the first time in the psychiatric report dated 22 January 2014. We also note in that context that the Appellant's medical conditions include heart problems and a significant stroke. In relation to the latter she is prescribed appropriate medication and receives necessary medical care.
>
> [34] What is clear is that the Appellant has given an account of her difficulties in Zimbabwe in the psychiatric interview and this account is the account which was before the Immigration Judge in 2008. It is said that her psychiatric condition is because of the trauma she suffered in Zimbabwe. We have no new evidence which could cast doubts on the findings of credibility in the previous determination. ..."

16. The Appellant's grounds of application to the Upper Tribunal assert that the Panel erred in *"dismissing the report out of hand as they have failed to give any reasons for rejecting Professor Katona's conclusions."*

17. Contrary to what is submitted in the grounds, the Panel did not reject Professor Katona's diagnosis that the Appellant has PTSD and depression. This is plain from reading paragraphs 33 and 34 of the determination together with paragraph 38, in which the Panel come to the conclusion that the Appellant's psychiatric condition is not exceptional.

18. The Panel was entitled to conclude that the state of the Appellant's mental health and the diagnosis of PTSD and depression as at the date of her examination by Professor Katona did not undermine Judge Turkington's assessment of her credibility. As the Panel identified, Professor Katona's evidence as to the events which caused these illnesses was based on the word of the Appellant, whose account of such events had been comprehensively disbelieved by Judge Turkington.

19. Like the Panel, we find that the evidence given by Professor Katona is not capable of undermining Judge Turkington's findings. First, as the Panel identified, the letter of instruction to Professor Katona was not produced before it, and has still not been produced. Second, despite Professor Katona being in possession of Judge Turkington's determination he makes no reference to its findings in his conclusory paragraphs and provides no evidence as to the possibility of the Appellant's mental health issues being caused by events other than those relayed by the Appellant to him. Third, Professor Katona comes to his conclusions as to the current diagnosis of the Appellant's mental health problems on the basis of the symptoms that were presented to him on the day of his assessment. He does not seek to identify when it is said that the Appellant's symptoms first presented themselves, how it might be that health professionals in the criminal detention environment did not diagnose the Appellant's illness at the time of her detention, or as to what her symptoms were, or were likely to have been, at the time of her asylum interviews and appeal hearing in 2008. The Appellant also was represented by the Refugee Legal Centre at that time of her 2008 hearing, an organisation with considerable experience of dealing with mental health issues presented by asylum claimants, and yet no evidence relating to the appellant's mental health was presented to Judge Turkington.

20. In addition, the Appellant has not provided any evidence herself as to these matters; in particular as to why no medical evidence relating to her mental health problems was put before Judge Turkington.

21. Moving on to the ground relating to the Panel's consideration of the evidence given by Ms Mw, Ms Mw provided evidence relevant to two aspects of the Appellant's claim by way of an undated and unsigned

witness statement. She did not attend before the Panel to provide live evidence.

22. In her witness statement Ms Mw spoke both to events said to have taken place in Zimbabwe prior to the Appellant's arrival in the United Kingdom (in particular in relation to her, and the Appellant's, MDC activities in Zimbabwe) and also to her, and the Appellant's, claimed United Kingdom based MDC activities.

23. The Panel considered this evidence in paragraph 36 of its determination, stating as follows:

> "In her typed but unsigned witness statement she *[reference here being made to Ms Mw]* states that she knew the Appellant in Zimbabwe. She states that she and the Appellant were both involved in the MDC. The witness, Ms Mw made a claim for asylum and her appeal was heard on 23 January and 21 March 2008 by Immigration Judge Milligan-Baldwin. The judge had rejected the witness's claim for asylum on the basis that the account had been concocted to avoid being removed from the UK. However, she allowed her appeal on the basis that she had a well-founded fear of persecution on the basis of her *sur place* MDC activities in the UK. We note that this witness did not attend the appeal hearing before us despite previous Tribunals having been provided with a copy of her witness statement which suggested that the Appellant was active in MDC activities in the UK. We have little evidence of this before us and we reject the *sur place* claim as it does not satisfy us that the Appellant is involved in MDC activities in the UK and further that her activities have come to the attention of the authorities in Zimbabwe so as to place her in danger upon return to her home country."

24. We can find no basis upon which the Panel would have been entitled to disturb the adverse credibility findings made by Judge Milligan-Baldwin in Ms Mw's appeal and it is plain to us that for this reason the Panel rejected Ms Mw's evidence regarding her, and the Appellant's, involvement in the MDC in Zimbabwe.

25. Before us Ms Short submitted that the Panel erred in rejecting the evidence given by Ms Mw as to her own involvement in the MDC in the United Kingdom. As we identified during the course of the hearing, this submission is based on a clear misreading of paragraph 36 of the Panel's determination. The Panel did not reject the evidence given by Ms Mw as to her own involvement in the MDC in the United Kingdom, indeed it referred to Judge Milligan-Baldwin's acceptance of that evidence. The Panel did, however, reject Ms Mw's evidence given in relation to the Appellant's alleged United Kingdom based MDC activities, as it was entitled to. In any event, the Panel concluded in the alternative that even if the Appellant had been active in the MDC in the United Kingdom, as claimed, she would nevertheless not be at risk upon return to Zimbabwe [see paragraphs 36 and 40]. Again, in our conclusion this was a finding open to the Panel.

26. Ms Short further maintained that the Panel's conclusions in relation to the Refugee Convention were flawed by legal error in that it conflated (or in the words of the grounds "muddled") considerations under the Refugee Convention with those in relation to Article 8 ECHR. We do not accept that this is so.

27. The Panel clearly and carefully dealt with the Refugee Convention ground in its reasoning up to paragraph 36 of its determination. Had its consideration of that ground stopped there, anyone reading the determination would have been in no doubt as to its conclusion, or about the reasons why it came to such conclusion.

28. Thereafter, the Panel gave consideration to the Appellant's Article 8 claim, a relevant aspect of which was the findings made by the Panel in relation to the Refugee Convention claim. These findings are relevant to the Article 8 proportionality assessment in two respects: first, that the Appellant faces no risk of ill-treatment upon return to Zimbabwe and, second, that the Appellant has maintained a false asylum application and given false evidence to the Secretary of State and the Tribunal on more than one occasion.

29. Even if we are wrong in our consideration of the structure of the determination and the Panel did initially consider the refugee claim, then interposed considerations of Article 8 and then came back, in paragraph 40 of its determination, to conclude its assessment of the refugee claim, there is nothing inherently unlawful in this approach, as long as the reader of the determination can properly identify the reasons given by the Panel for its conclusions in respect of each of the grounds. In this case the reasons why the Panel dismissed the appeal on both Refugee Convention grounds and Article 8 grounds are readily identifiable from reading the determination as a whole.

30. We turn finally to the grounds relating specifically to the Panel's consideration of Article 8 of the Human Rights Convention. It is incorrect to say, as is asserted in the grounds, that the Panel failed to consider either the Appellant's physical and moral integrity or her caring responsibilities.

31. At the hearing Ms Short clarified that in the former submission reference was being made to the failure of the Panel to take into account the Appellant's mobility problems. In paragraph 38 of its determination the Panel took account of the fact that the Appellant suffers from serious medical problems. There is no reason to believe that in so doing the Panel excluded from its consideration the problems the Appellant has with her mobility.

32. As to the ground relating to the Appellant's caring responsibilities, the Panel refer to evidence in relation to these responsibilities in paragraphs 11, 12, 20 and 24 of the determination and extensively further reference this evidence in paragraph 38, accepting its truth.

33. Ms Short additionally placed reliance on the decision of the Court of Appeal in UE (Nigeria) [2010] EWCA Civ 975, in support of the submission that the Panel erred in failing to treat the Appellant's caring responsibilities as a matter reducing the weight to be given to the public interest in her deportation.

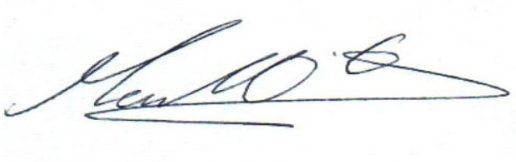
34. We can find nothing in the Panel's consideration of the Appellant's caring responsibilities that is inconsistent with the approach commended by the court in UE (Nigeria). There is ample authority, including from the House of Lords and the Supreme Court (see for example R (Razgar) v SSHD [2004] UKHL 27) establishing that what is required in the assessment of proportionality is a broad exercise of striking a fair balance between the individual and the interests of the community. This is the approach taken by the Panel in the instant appeal. The court in UE was not seeking to depart from this established authority, but rather was considering a specific circumstance in which a Tribunal judge had specifically excluded from his considerations the loss to the community of the value of a person whom the Secretary of State intended to remove. The Panel did not fall into such error.

35. Even if we are wrong, and the Panel did err in the manner suggested by Ms Short, in our conclusion such an error was not capable of affecting the outcome of the appeal. As Sir David Keene identified in UE *"[w]hile this factor of public value can be relevant…I would expect it to make a difference to the outcome of immigration cases only in a relatively few where the positive contribution to this country is very significant…"* [36]. In our view, the loss of 'public value' is even less likely to make a difference in a case such as the instant one, where the Appellant is being deported from the United Kingdom pursuant to the operation of section 32(5) of the 2007 Act.

36. Turning lastly to paragraph 11 of the grounds, there has been no suggestion from any quarter that the Appellant presents a risk of reoffending, and we have no doubt that it was on this basis that the Panel proceeded in its determination. We are fortified in this view by the terms of paragraph 41 of the determination in which it is implicit that the Panel took the view that the Appellant was not at risk of committing further offences. The Appellant's offending relates to her attempts to remain in the United Kingdom. It is self-evident in our view that if she is granted a right to remain here she will have no motivation to commit further offences of this type.

37. Looking at the determination as a whole, as we must, we find that the Panel took into account all materially relevant matters, did not take into account any irrelevancies, gave legally adequate reasons for its conclusions and came to conclusions which were open to it on the available evidence. As a consequence we conclude that the Panel's determination is to remain standing and the Appellant's appeal before us is dismissed.

Signed:



Upper Tribunal Judge O’Connor
Date: 8 May 2014