Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00301/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3 November 2014

Reasons and Decision Promulgated
On 17 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR TANAKA GILBERT SEKERANI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Wilkins of Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Mr Neville-Smart, Senior Presenting Officer.

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe who appeals with permission against the determination of First-tier Tribunal Judge Chohan and Sir Geoffrey James KBE CMG sitting as a Panel promulgated on 8 May 2014 in which they dismissed the appellant's appeal against the deportation decision of the Secretary of State made on 14 February 2014 to remove him from the United Kingdom pursuant to section 5 (1) of the Immigration Act 1971.

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The appellant's case

2. The appellant had claimed asylum on the bases that he fears the ZANU PF in Zimbabwe which claim was rejected in 2003. The appellant no longer relies on his asylum claim but on his claim for humanitarian protection.

3. The appellant claims he cannot return to Zimbabwe because of his mental health problems as he has been diagnosed as suffering from paranoid schizophrenia. He relies on a report from Dr Gillian Wainscott, a consultant psychiatrist dated 27 February 2014. The appellant claims that he has established a family and private life in the United Kingdom because he has a cousin in this country who has been helping him.

The respondent's case

4. The respondent's case is the following which I summarise. The appellant gave two different dates for when he entered the United Kingdom. One is 29 December 2002 and the other is 12 July 2002. His screening interview took place on 25 April 2003. The appellant made several applications for voluntary return on 17 September 2004, 17 October 2008 and 21 February 2013. The first two applications were withdrawn and his last application was rejected by the respondent. The appellant also applied for return to Zimbabwe under the Facilitated Return Scheme on 28 February 2013 but that application was rejected. The appellant had no leave to remain in the United Kingdom and remained here illegally.

5. On 9 September 2010 the appellant was convicted of causing/inciting a female child under 16 to engage in sexual activity. He was convicted and sentenced to a hospital order to be detained under section 37 of the Mental Health Act 1983. He was also made to sign the sex offenders register for seven years and a sexual offences prevention order for a period of seven years. The sentencing judge also made an order that the appellant should be prevented from loitering within 50meters of any children's play area or school and not to have unsupervised access to children under the age of 16. The respondent issued the notice of decision to make a Deportation Order under the 1971 Act and the appellant appealed against the decision and the first-tier Tribunal dismissed his appeal.

6. The appellant can be returned to Zimbabwe as there is medical treatment available to him after considering the background evidence on Zimbabwe.

Appeal before the First-tier Tribunal

7. The appeal came before First-tier Tribunal Judge Chohan sitting at Birmingham hearing Centre on 7 April 2014. The Judge made the following findings.

(i) The appellant's case falls under paragraph 398 (c) of the Immigration Rules "the deportation of the person from the UK is conducive to the public good because in the view of the Secretary of State, their offending his cause serious harm or they are a persistent offender who shows a particular disregard of the law. The appellant has to show that there are exceptional circumstances that the public interest in deportation would be outweighed by other factors [22];

(ii) The findings of the previous Judge of the starting point in the appellant's appeal [28] in line with the case of **Devaseelan v SSHD [2002] UK IAT 00702**. The previous Judge made adverse credibility findings against the appellant and the appellant has not challenged the decision. Therefore the findings in respect of the appellant's asylum appeal remains the same as in 2003. The real issue that has to be considered is risk on return bearing in mind that more than 10 years have lapsed since the previous hearing. [30];

(iii) In respect of the appellant's return and considering the case of **N v Secretary of State for the home Department [2005] UK HL 31,** the background evidence on medical treatment available to the appellant in Zimbabwe and Dr Wainscott's reports [35-46] demonstrates that mental health treatment is available in Zimbabwe but that is not in itself a reason for him to be granted leave to remain.

(iv) While it is appreciated that the appellant is suffering from mental illness, however it is not the case that no treatment or medication is available to him in Zimbabwe even though it is not to the standard of this country but that is not the test. The appellant has a mother and step-father in Zimbabwe and has been in contact with them. There is no reason why the appellant could not return to his family and continue his treatment in Zimbabwe [47];

(v) In the case of **Bensaid** [48] it was stated at paragraph 37 that deterioration in his already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (such as withdrawal and lack of motivation). The court considers that the suffering associated with such a relapse could in principle, fall within the scope of Article 3. However [49] the EEC HR went on to find that article 3 would not be engaged in the applicant's case as they were no exceptional circumstances. Similarly the appellant fails to establish his case under article 3 and article 8 of the ECHR.

The grounds of appeal

8. The grounds of appeal which are dated 9 July 2014, state the following which I summarise. On 9 September 2010 the appellant was convicted of causing/inciting a female child under 16 to engage in sexual activity and was sentenced to a hospital order under section 37 of the Mental Health Act 1983 following his arrest and detention in custody. In custody he

presented with symptoms including hallucinations, attending to personal needs (such as obtaining food) only when prompted and neglected his personal safety. The appellant was diagnosed with paranoid schizophrenia which is currently managed with 20 mg of Olanzapine, a powerful antipsychotic medication at maximum dosage. He has insight both into his illness and his offending and the connection between the two. The hospital order was discharged on 8 September 2012 but the appellant remains voluntarily as an inpatient at Ross House Community Rehabilitation Unit where he was moved on 3 April 2012.

9. The First-tier Tribunal accepted that following **Bensaid v United Kingdom [2001] AC** Article 8 and Article 3 could be engaged in a case involving mental illness, but as in that case, the appellant has not shown any exceptional circumstances. The Tribunal found that the medical treatment was available in Zimbabwe and the appellant could return to be with his family.

10. The first ground of appeal states that the Panel failed to take into account relevant evidence and to give adequate reasons for their finding that there is medical treatment available to the appellant in Zimbabwe. The country guidance cited by the Tribunal notes that in respect of the health system infrastructure in Zimbabwe that there have been improvements in some areas including access to drugs. However the assessment of mental health care is assessed as inadequate, identifying only 10 psychiatrists in the entire country, a shortage of drugs resulting in patients not receiving adequate therapy and in patients subjected to deplorable living conditions.

11. Dr Wainscott the appellant’s treating consultant psychiatrist states that enquiries were made but she could not establish with any certainty whether similar treatment in terms of medication, monitoring and rehabilitation is available in Zimbabwe. Furthermore she notes in her letter dated 28 November 2013 that psychiatric help is only available on a private basis. The Tribunal nevertheless concluded that the mental health treatment is available and drugs (unspecified) are available.

12. The Tribunal does not make any finding as to whether the kind of antipsychotic drugs the appellant would require are available in Zimbabwe or why the panel concludes that it has not been established that Olanzapine is not available. This contrasts with the analysis of the European Court of human rights in **Bensaid** which had positive evidence that Olanzapine was available in Algeria (free as an inpatient, possibly on payment as an outpatient) and finds it likely that other medication in the management of mental illness is likely to be available. It is noted that the evidence cited by the Tribunal in respect of improvements in access to drugs refers to essential drugs and not to specialised antipsychotic medication.

13. The Tribunal makes finding as to how the appellant might be expected to pay for any treatment by psychiatrist professionals he has to access, despite the evidence of Dr Wainscott that it is only available privately. In

doing so they failed to consider the evidence that even if, treatment for paranoid schizophrenia is available, it is not available for this appellant.

14. The second ground of appeal states that the Panel did not take into account the evidence that the appellant's mother is too unwell to care for him and that he has no other family support in Zimbabwe. The Tribunal notes at paragraph 47 of the determination that the appellant's mother is in Zimbabwe that the appellant has been in contact with her on the telephone regularly and concludes that there is no reason why he could not return to his family in Zimbabwe. This not only disregards the evidence of the appellant that his mother is too unwell to care for him but in any case his mother is not qualified or capable of coping with his needs. The Panel further disregards the evidence of Dr Wainscott and her letter dated 28 November 2013 states that the appellant healthcare team (as understand from his family) is that they are not able to support him financially, emotionally or physically thereby implying that they made separate enquiries directly with the appellant family. It is submitted that this is a material error of law. The European Court of Human Rights in **Bensaid** gave significant weight to the applicant having family in Nigeria, conversely **in D v United Kingdom** it was of great significance that he did not have any family support in St Kitts and Nevis.

15. The third ground is that the Tribunal failed to take into account give adequate reasons for rejecting Dr Wainscott, the consultant psychiatrist evidence. The Tribunal disregarded the evidence of Dr Wainscott in respect of the availability of mental health treatment in Zimbabwe. The Tribunal at paragraph 40 and 42 highlights the fact that Dr Wainscott has not outlined in her report as to what exact enquiries were made about availability of treatment in Zimbabwe. The Tribunal appears to impugn the credibility of Dr Wainscott despite her senior professional status, without giving sufficient reasons for doing so. The Tribunal further doubts at paragraph 38 that on the basis of Dr Wainscott conclusion at paragraph 8 of her report that if the appellant is forcibly sent back to Zimbabwe it is inevitable that his health will deteriorate dramatically. This is despite the fact that in paragraph 7 and 10 Dr Wainscott clearly indicates deterioration is linked to treatment stopping and in her letter Mr Mellor also states that deportation "would be a powerful trigger for a serious relapse as less robust plans were in place in Zimbabwe for his continuing care as previously described".

Permission to appeal

16. First-tier Tribunal Judge Keane gave the appellant permission to appeal on only the third ground stating that it was arguable that the Panel failed to give any or adequate reasons for refusing to accord weight to Dr Wainscott's conclusion that upon his return to Zimbabwe, the appellant's mental health condition would deteriorate dramatically.

17. On 6 August 2014 Upper Tribunal Judge Jordan in a renewed application granted the appellant permission to appeal on all grounds.

Respondent's Rule 24 response

18. By way of a reply to the grant pursuant to Rule 24 the respondent stated the following which I summarise. The Judge of the First-tier Tribunal directed himself appropriately. The Panel considered the report of Dr Wainscott in detail as set out in paragraph 36 onwards. The Panel noted that the report asserted that the appellant's health would deteriorate rapidly on return although the reasoning to support this was not clear. The availability of treatment and the needs of the appellant were apparently researched. However, the Panel found that it was not clear what enquiries were made. The Panel concluded that if the appellant continued to take his medication he would not be at risk. The Panel took full account of the background evidence to conclude that it was not established that the drugs required by the appellant were not available. The Panel applied the threshold test contained within **Bensaid** and concluded that the appellant did not succeed. The Panel's findings were open to them based on the evidence and does not disclose an error in law.

Submissions of the parties as to whether there is an error of law

19. Ms Wilkins in her submissions stated the following which I summarise. She adopted her grounds of appeal. She said that the Judge did not consider all the evidence of the medical treatment was available for this particular appellant in Zimbabwe. It is not disputed that there is some mental health available in Zimbabwe but it is not available to this particular appellant. The appellant has been detained under the Mental Health Act and is on medication which cannot be reduced. In Zimbabwe, 90% of the clinics in mental health are in Bulawayo and the appellant lives in Harare as does his family and this was not considered by the Judge. The appellant will not be able to afford the treatment even if he can get it privately. The Judge did not take into account that his mother in Zimbabwe is too unwell to care for him.

20. The appellant was discharged on 8 September 2012 but the appellant continues to live voluntarily as an inpatient at Ross House Community Rehabilitation Unit where he was moved on 3 April 2012. The appellant has has mental health support in this country. The existence of family support is crucial as was stated in the case of **Bensaid**. The Judge doubted Dr Wainscott's conclusions and the enquiries as she did not say from whom she made these enquiries. The appellant's condition is crucial. There are exceptional circumstances in the appellant's case because he faces a real risk of harm on return to Zimbabwe due to his mental situation.

21. Mr Smart on behalf of the respondent adopted the rule 24 response and stated the following in summary. The Judge considered the evidence fully and consider the evidence of Dr Wainscott adequately. The Panel was entitled to ask why Dr Wainscott did not set out in her report what enquiries she made. The Judge was entitled to reach the conclusion on the evidence. The Judge was entitled to conclude that given that the appellant

has a mother and stepfather in Zimbabwe that there will be some element of support.

22. In reply Ms Wilkins said that at page 20 of the original grounds it that "we don't dispute that in Zimbabwe there will be treatment". The appellant will relapse if he returns because he will not get medical treatment and that fact engages Article 8.

Did the determination of the First-tier Tribunal involve the making of an error of law?

23. In his determination at [7], the Panel states that more than 10 years have passed since the appellant's previous appeal hearing based on his claim for asylum and therefore the Panel will consider the risk to the appellant on return as at the date of hearing. The [8] the Panel was aware therefore that the main issues in the appellant's claim is in respect of his mental health problems because he has been diagnosed as suffering from paranoid schizophrenia and at [8] the appellant's claim that he has established a family life and private life in the United Kingdom.

24. The Panel [22] stated that as the appellant does not meet the requirements of the Immigration Rules, he has to establish that there are exceptional circumstances that the public interest in deportation would be outweighed by other factors". The Panel took into account the Court of Appeal [23] case of **MF Nigeria v SSHD EWCA Civ 1192** as to would amount to exceptional circumstances. It was held in that case that exceptional circumstances simply mean sufficiently compelling reasons that outweigh the public interest in deportation.

25. The Panel had regard to the Strasbourg jurisprudence in respect of mental health relevant to Article 3 and Article 8 in respect of physical and moral integrity. They referred to the leading case of **N v Secretary of State for the home Department [2005] UK HL 31** where it was held by the House of Lords that there must be shown that the appellant's medical condition has reached such a critical state that there are compelling and humanitarian grounds for not removing him or her to a place which lacks the medical and social services which he or she would need in order to prevent acute suffering. The House of Lords approach was confirmed by the European Court of Human Rights. The Panel was therefore aware of the standard against which the appellant's appeal has to be assessed and recognised that the threshold to succeed under Article 3 on medical grounds is very high.

26. The Panel took into account the case of **Bensaid** where the applicant suffered from long-term schizophrenia and it was argued on his behalf that his condition would seriously deteriorate if he returned to his home country because of difficulties in obtaining suitable medication. It was found that while in principle this could engage Article 3 the Court found that there were no exceptional circumstances that the claimant should succeed.

27. Similarly the Panel found [49] that in this case there are no exceptional circumstances and the appellant's appeal fails to establish his case under Article 3 and Article 8 of the ECHR in respect of his mental health problems.

28. The Panel [36] in making this decision gave proper consideration to Dr Wainscott's report and take into account that at paragraph 2 the report states that the appellant's "symptoms are well controlled with the administration of Olanzapine 20 MG at night". In the same paragraph Dr Wainscott notes that the appellant "no longer presents a risk to himself through neglect". The Panel took into account that Dr Wainscott stated that the appellant will need to continue his treatment for the rest of his life which was the administration of 20 mg of Olanzapine. The panel also considered [36. 4] that the appellant is no longer a danger to the public since his illness has been controlled and during his time at Ross House, there was no suggestion that he has posed any threat to children. They also considered that the report stated that the appellant was aware that he has been placed on the sex offenders register for seven years which imposes certain restrictions on him as to his proximity to children under the age of 18 years and the need for supervision. The report noted that the appellant has been "entirely compliant with these restrictions".

29. This report demonstrated to the Panel that the appellant has understood why he has been placed on the sex offenders register and his behaviour has been accordingly compliant. It cannot in the circumstances be properly argued that the Panel did not take into account Dr Wainscott's report.

30. However, the Panel questioned [38] on what basis Dr Wainscott made her finding if the appellant "is forcibly sent back to Zimbabwe it is inevitable that his health will deteriorate dramatically". The Panel questioned the expert's conclusions in her report which stated "we have made enquiries and have not been able to ascertain with any certainty that similar treatment i.e. medication, expert monitoring of mental state with adjustments to medication and progress with rehabilitation into the community-based activities is available at any level in Zimbabwe". The panel was entitled and indeed duty-bound to require the psychiatrist to have included in her report the source of the enquiries that she had made which formed the bases for the expert psychiatrist to reach this conclusion. The Panel [39]

31. I do not take their enquiries to indicate that the Panel in any way impugned the psychiatrist credibility. The Panel's findings in respect of Dr Wainscott's report was not perverse and open to them on the evidence. The Panel took into account [41] that it is apparent from Dr Wainscott's report that as long as the appellant continues to take his medication, his symptoms will be controlled and he will not be no danger to the public.

32. The Panel took into account [42] the country of origin information report in July 2012 in respect of medical treatment in Zimbabwe and noted that it

states that the international committee of the Red Cross report on Zimbabwe published in May 2011 stated that “people in Zimbabwe have improved access to healthcare”. The Panel also took into account [44] that the UKBA FFM report 2010 recorded the comments were representative of the Zimbabwe human rights Forum that there have been improvements in the health sector and people are getting drugs many being provided by humanitarian organisations. The Panel [45] considered the background information in respect of mental health specifically and stated that paragraph 25.52 of the country report refers to the US State Department’s country reports on human rights practices 2011 published on 24 May 2012 notes that persons with mental disabilities also suffer from inadequate medical care and general provisions of health services. There are eight centralised medical health institutions in the country with a capacity of more than 1300 patients in addition to the three special institutions run by the ZP S for long-term patients and those considered to be dangerous to society. Patients could wait for at least one year for a full medical review. A shortage of drugs and adequately trained mental health professionals resulted in patients not been properly diagnosed and not receiving adequate therapy. There were fewer than 10 certified psychiatrists working in public and private clinics and teaching in Zimbabwe. There was a 50% vacancy rate for psychiatric trained nurses. More than 90% of the available psychiatric services were provided at the mental institution in Bulawayo. NGOs reported patients subject to deplorable living conditions due in part to shortages of food, water clothing and sanitation. Budgetary constraints and limited capacity at these institutions resulted in persons with mental disabilities been kept at home and cared for by family, normally in chains and without treatment”.

33. The Panel was aware as the low quality of the treatment available to Zimbabwean nationals with mental disabilities and found that medical facilities in Zimbabwe are not at par with the medical facilities in this country but noted that that is not reason enough for the appellant to be granted humanitarian protection in the United Kingdom. The Panel [47] considered that the appellant’s immediate needs are that he continues to take 20 mg of Olanzapine every day and that would control his mental condition.

34. The Panel found that the appellant has not demonstrated that the medication Olanzapine is not available in Zimbabwe and Dr Wainscott did not provide details of the enquiries she made as to whether this particular drug is available. The evidence before the Panel was that the appellant is no longer under a mental health order and that he voluntary continues to live at Ross House. This evidence demonstrated to the Panel that the authorities in the United Kingdom have deemed the appellant to be safe to be released into the community, albeit with his name on the sex offenders register.

35. The Panel [47] also took into account that the appellant has his mother and stepfather in Zimbabwe and noted that the appellant stated at paragraph 11 of his statement that he speaks to his mother every two

weeks on the telephone. This demonstrated to the Panel that the appellant was sufficiently close to his parents for them to be of some support to him on his return. I do not accept the argument put forward for the appellant that the Panel did not take into account that the appellant's mother cannot look after him. The Panel made it clear that if the appellant returns to Zimbabwe he will live with his parents who will be able to provide him with emotional support, if not financial. I find that there is nothing perverse on this conclusion based on the fact.

36. The Panel was entitled to find [57], taking into account the appellant's conviction and sentence for a very serious crime relating to sexual activities with minors, that it would be conducive to the public good that the appellant is deported from the United Kingdom. The Panel was entitled to find that the appellant has failed to establish any exceptional circumstances and that any difficulties he has on his return to Zimbabwe [58] will be of a temporary nature and his mother in that country will be able to help him and antipsychotic medication will be available for him in Zimbabwe because background evidence states that while it is limited and of poor quality, it does not say it is not available

37. The Panel were of the view that the appellant cannot continue to live in this country to benefit from the medical care being provided to him for the rest of his life. It is implicit in the determination that the Panel found that the Strasbourg jurisprudence does not impose such an obligation of medical care upon the contracting State.

38. Accordingly, I am satisfied that the Panel did not make a material error of law in refusing the appellant's appeal was under Article 3 and Article 8. I find that a different Upper Tribunal Judge would not reach any other conclusion taking into account all the evidence and the law in this appeal.

Signed by
Mrs S Chana
Deputy Judge of the Upper Tribunal

Date 12th day of November 2014