IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00130/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 21st October 2015	**On 6th November 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XM
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation:
For the Appellant: Miss Johnstone, Home Office Presenting Officer
For the Respondent: Mr T Rehman of Kings Court Chambers

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Designated Judge Shaerf and Mrs Padfield who allowed the claimant's appeal against the Secretary of State's decision made on 20 December 2013 to make a deportation order by virtue of Section 32(5) of the UK Borders Act 2007. The hearing took place on 24th July 2014. The decision was promulgated on 24th November 2014.

Background

2. None of the facts underpinning this decision are in dispute.

3. The claimant is a citizen of Zimbabwe born on 22nd June 1989. He arrived in the UK on 15th December 1996 with leave to enter as a visitor and, on 7th January 1998, was granted indefinite leave to remain in line with his mother.

4. He has a number of convictions for possession of cannabis dating from 2008. On 30th June 2012 he was convicted for possession with intent to supply cannabis and cocaine and facilitating the acquisition or possession of criminal property for which he was given three years for the cocaine offence and nine months concurrent for each of the other two offences. He had been assessed as at medium risk of re-offending. Since his release on licence the claimant has received support from the Methodist Revival Church which indicated some steps towards rehabilitation.

5. The family lived in London. The claimant mixed in bad company and in 2006 attempted to dissociate himself from his friends. As a consequence he was beaten and severely injured, being hospitalised for two months. The claimant said that he now experienced severe anxieties about strangers and the doctors had informed him that he had "lost some intelligence".

6. His mother is aged 56, diabetic and HIV positive. The judge found that he enjoyed family life with her. He was impressed by the way the family had moved away from London when it understood the nature of the activities with which the claimant had involved himself, moving first to Chesterfield and then to Sheffield.

7. The claimant himself had only visited Zimbabwe once since his arrival in the UK, in 2008, when they stayed in a hotel, in order to organise Zimbabwean passports in connection with their applications for continuing leave in the UK. The judge accepted that the claimant had lost his ability to speak Shona

8. His mother has visited Zimbabwe on a number of occasions to see his stepfather before he joined her in the UK. His eldest brother had also been there some two or three times and his married sister about three times. His stepfather had some family in Zimbabwe but his mother had no family on her late husband's side. The judge concluded that the claimant had established that he had no ties with Zimbabwe.

9. With respect to the wider family, the claimant has uncles in the UK, including one who was the Secretary General of ZAPU. Although it was submitted that the claimant would be identified and linked to him the judge found, absent other evidence, that it would be implausible that he would be so linked.

10. The appeal was allowed under the Immigration Rules in force at the time of the decision and the hearing.

11. The judge wrote as follows:

> "The hearing took place shortly before the coming into force of Section 19 of the Immigration Act 2014 inserting Sections 17A to D in the 2002 Act. We also note that changes to paragraphs 398 to 399A of the Immigration Rules were effected on the same day as Section 19 was brought into force, 28 July 2014. Our view is that the appellant has shown that paragraph 399A(b) of the Immigration Rules as in force at the date of decision and the hearing applies to him. The appellant's appeal succeeds under the Immigration Rules."

12. The judge then considered "the Article 8 claim outside the Immigration Rules". He wrote:

> "We do find that the appellant's long residence in the UK, his education here and his lack of ties to Zimbabwe would mean his deportation would effectively be a sentence of exile. For these reasons together with the particular circumstances of his family and their relocation from London to the north because of and for the benefit of the appellant we consider his deportation to Zimbabwe would place the UK in breach of its obligations to respect his private and family life, particularly with his mother. In all the circumstances we concluded it would be disproportionate to the legitimate public objectives identified in Article 8(2) and already mentioned. For these reasons the appeal also succeeds on human rights grounds."

The Grounds of Application

13. The Secretary of State sought permission to appeal on the grounds that the judge had materially misdirected himself in law. He had erroneously considered the Immigration Rules as at the date of decision but ought to have considered them as at the date of 28th July 2014. In failing to consider the relevant version of the Immigration Rules the judge had materially erred in law. The claimant had demonstrated a flagrant disregard for UK laws. He had not lost all links to Zimbabwe. He was a young, single healthy adult and failed to demonstrate any very significant obstacles to his reintegration there.

14. Second, in purporting to consider the Article 8 claim outside the Immigration Rules the judge had erred since the Immigration Rules are a complete code and fully comprehensive of Article 8.

15. Permission to appeal was initially refused by Designated Judge French but subsequently granted by Upper Tribunal Judge Kekić on 7th April 2015.

Consideration of whether there is a material error of law

16. Although Mr Rehman sought to argue that it was open to the judge to apply the Rules as they were as at the date of decision and the hearing I am satisfied that the Secretary of State is correct. The judge's decision was not made until it was promulgated, and that was some three months after the change in the Rules. Until that point he was required to take into account all relevant matters, which included the changes.

17. In YM (Uganda) v SSHD [2014] EWCA Civ 1292 Aitkens LJ stated:

> "So far as the new Part 5A of the 2002 Act is concerned Section 117A is in force as from 28 July 2014. There is no guidance anywhere as to whether the new provisions are to be applied to cases in which the SSHD has already made a decision and the matter has been appealed through the Tribunal system. But Section 117A itself says that the new Part 5A applies 'where a court or Tribunal is required to determine whether a decision made under the Immigration Act' breaches a person's Article 8 right and would so be unlawful under Section 6 of the Human Rights Act 1998. Either this course or the UT would, at the stage where the decision is being remade, have to determine whether a decision to deport YM is a breach of his Article 8 rights, so it would have to apply the statutory provisions applicable to that determination that are then in force. To my mind that does not involve any issue of retrospectivity. Even if it did it seems to me that the relevant question to ask is that posed by Lord Mustill (in the context of a new statutory provision) in L'office Cherifien des Phosphates v Yamashita-Shinnohon Steamship Company Limited. What does fairness require? This test was adopted by the House of Lords in Odelola v SSHD in the context of changes in the Immigration Rules between the date of an application for leave to remain and the time the application was determined by the SSHD. To my mind there is no unfairness in applying the new statutory provisions to a decision that has now to be made by a Tribunal or court. The decision should reflect the balance that has been struck, which has some benefit and perhaps some drawbacks for the persons concerned.
>
> So far as the 2014 Rules are concerned, it is clear from the provisions of Rule A362 itself, as well as the statement under implementation in the Statement of Changes and paragraphs 3.4 and 4.7 of the Explanatory Memorandum, that the 2014 Rules are to be applied in all decisions concerning Article 8 claims that are made after 28 July 2014. As Lord Hoffmann said in the Odelola case, the Immigration Rules are a statement by the SSHD of how she will exercise powers of control over immigration. Thus, in the absence of any statement to the contrary, the most natural reading of the Rules is that they apply to decisions taken by the SSHD until such time as she promulgates new rules, after which she will decide according to the new rules. The same applies to decisions by tribunals and the courts: that is why in MF (Nigeria) v SSHD the Court of Appeal held that both the UT and it were obliged to apply the 2012 Rules to MF, despite the fact that the SSHD had taken her original decision in 2010 under the pre-existing rules."

18. Since the decision in this case was made in November 2014, when the new Rules were in force, the judge was obliged to take them into account. The correct course would have been to reconvene the hearing so that the claimant had the opportunity of making his arguments in respect of the new Rules.

19. Second, the judge erred in law in considering Article 8 outside the new Rules. MF (Nigeria) v SSHD [2013] EWCA Civ 1192 found that:

> "In determining whether a case is exceptional, all relevant factors in favour of and against deportation are to be considered under the new Rules. On this approach it is difficult to see what scope there is for any consideration outside the new Rule i.e. they provide a complete code. The new

> Immigration Rules set out a number of exceptions to where the public interest in deportation could be outweighed by other factors, including a provision that the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. Accordingly there is provision within the Rules for a consideration of whether there are such circumstances not described in them by the exceptions. "

20. Accordingly, the judge's decision must be set aside.

Remaking the decision

21. I gave Mr Rehman the opportunity to seek instructions so that he could ascertain whether there was any fresh material which he wished to place before me in relation to the new Rules. After doing so he said that he had no other evidence to put before the Tribunal and wanted to rely upon the evidence put before the First-tier Judge.

22. Ms Johnstone submitted that, whilst there was no challenge to the findings of the judge, the appeal had to be dismissed by reference to the new Rules. The judge had rejected the claim of a well-founded fear in Zimbabwe. Whilst the claimant had no direct family members there he did have connections through his family and, as a single male with no children who had lived in a number of places in the UK could not meet the requirements of the new Rules.

23. Mr Rehman reminded me that, whilst the index offence was of course very serious, the claimant's other convictions were for the much less serious offence of possession of cannabis and had taken place when he was an adolescent.

24. He had been here since the age of 7 and had lost the use of his native language. He spoke only English. It was not challenged that the claimant had only visited Zimbabwe once since 2008, and the fact that the family stayed on that occasion in a hotel was indicative of the severance of ties there. Although his mother had returned to Zimbabwe she did not use the family name and therefore would not be at risk of having a connection with the Secretary of State General of ZAPU. She herself was unwell, being HIV positive and suffering from diabetes. The claimant had always lived with her and the original judge had accepted that there was family life in this case.

25. If the claimant were to be deported to Zimbabwe he would be going to a country where he would have no ties and where he did not speak the native language. He had given oral evidence of the effects of the assault in 2006 and still had checkups with the GP. He would suffer immense problems on return.

26. Moreover the political situation in Zimbabwe was unstable and the economy poor such that a large number of Zimbabweans were immigrating to South Africa to seek employment there.

27. The claimant had obtained a number of certificates whilst in custody and had since attempted to make progress with his education through the local church. He was well motivated to succeed.

Findings and Conclusions

28. The relevant Immigration Rules are set out in paragraphs 398 and 399 which are as follows:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399A. This paragraph applies where paragraph 399(b) or (c) applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) He is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

29. The other provisions of paragraph 399 apply to where the person has a genuine and subsisting relationship with a partner or a qualifying child and are not applicable here.

30. Those provisions are mirrored in Section 117C of the Immigration Act 2014 inserted into Part 5A of the Nationality, Immigration and Asylum Act 2002. 117C(iv) sets out the same provisions as that set out in 399A of the Immigration Rules.

31. It is not disputed that the claimant has been lawfully resident in the UK for most of his life.

32. The Secretary of State argues that the claimant has demonstrated a flagrant disregard for UK laws having acquired numerous convictions during his residence in the UK. His persistent offending demonstrates a lack of social and cultural integration for the purposes of paragraph 399A(b).

33. The claimant's criminal history is as follows:

    (i) 23rd June 2004 – reprimand for causing destruction or damage of property.

    (ii) 14th July 2008 – caution for possession of cannabis.

    (iii) 8th April 2010 – conviction for possession of cannabis: conditional discharge.

    (iv) 13th January 2011 – conviction for possession of cannabis: community order, costs and activity requirement.

    (v) 7th April 2011 – conviction for failing to surrender to custody: community order activity requirement 10 days.

    (vi) 12th April 2011 – breach of conditional discharge: community order activity requirement 10 days.

    (vii) 18th January 2012 – conviction for possession of cannabis: fine, victim surcharge and costs.

    (viii) 30th January 2012 – conviction for failing to surrender to custody: one day's detention.

    (ix) 30th June 2012 – conviction for possession with intent to supply cannabis and cocaine and facilitating the acquisition or possession of criminal property.

34. It is right to say therefore that the claimant's first conviction was in 2010 and the subsequent offences of possession resulted in conditional discharges and community orders. He is not someone who has been in and out of prison for years. His adolescent behaviour, and indeed behaviour in early adulthood, was poor, but it is not until the conviction of the index offence that his offending behaviour can properly be described as serious.

35. Set against that, he has been in the UK since the age of 7. He was educated here. All his immediate family and much of his extended family are here. The unchallenged finding of the original judge is that he has a lack of ties with any other country. Accordingly, I do not find that his criminal behaviour outweighs the considerable evidence in favour of his establishing social and cultural integration into the UK.

36. Moreover there would obviously be obstacles to his integration into Zimbabwe. He has only visited there once in 2008 for a relatively short visit when he stayed in a hotel with his family. He left when he was only 7 years old and will have few if any memories of that time. He has lost his ability to speak Shona. His lack of ties in Zimbabwe would make it difficult for him to obtain housing. He has obtained a number of certificates and Mr Rehman said that he was keen to train to be a social worker but the certificates do not establish a high level of educational achievement and he will undoubtedly find it difficult to obtain employment in a country where many of its citizens already leave to obtain work.

37. Furthermore he has the support here of a close-knit family who came to court in large numbers to provide help and assistance to the claimant and his mother. She herself has clearly been a tower of strength during this entire process.

38. Finally there is the oral evidence, not challenged, given before the original judge, that the claimant experiences severe anxieties in relation to strangers.

39. On the other hand the Rule is tightly worded and requires the claimant to establish that he would face very significant obstacles to his integration into Zimbabwe.

40. Whilst it is accepted that he no longer speaks Shona, he does speak English clearly and that is one of the three main languages in Zimbabwe.

41. Second, although reference has been made to the consequences of the attack on the claimant there is absolutely no medical evidence which establishes that he suffers from a condition such as to constitute a serious obstacle to integration. In the absence of that evidence, I have to conclude that the claimant's problems are not sufficiently serious so as to require medical intervention.

42. Finally, whilst he has no direct ties himself, it is clear that his family members have retained some links with Zimbabwe. They have been wholly supportive of the claimant to date. I have no doubt that they would be able to access some assistance for him there, particularly since other members of the family have visited over the years, and his stepfather has left Zimbabwe only relatively recently.

43. Accordingly, whilst I do not seek to minimise the difficulties not only for the claimant but for his family by this decision, Parliament has set out very

clearly its view of the public interest consideration. The deportation of foreign criminals is in the public interest. Although the claimant has been in the UK for a very long period of time, indeed since he was a young child, he simply is not able to meet the exceptions set out in the Rules and in paragraph 117C of the 2002 Act.

44. I have also considered whether there are any other factors which could constitute very compelling circumstances in the claimant's favour but, aside from the obvious fact that he has been in the UK since he was 7 years old, no evidence of such circumstances has been provided.

45. The Immigration Rules with respect to deportation are a complete code, since they contain a provision for the consideration of whether there are compelling circumstances outside the exceptions outlined in Paragraph 399A. Accordingly there is no scope for allowing this appeal outside them.

Notice of Decision

46. The original judge erred in law. His decision is set aside. The claimant's appeal against the decision to make a deportation order is dismissed.

~~No anonymity direction is made.~~

Signed Date

Upper Tribunal Judge Taylor