IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00006/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd February 2016	**On 7th March 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

NTANDOYENKOSI LOGAN MADAKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Reynolds, Counsel instructed by ITN Solicitors
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Zimbabwe born on 21st February 1990. He appeals against the decision of First-tier Tribunal Judge S J Clarke promulgated on 19th August 2015 dismissing his appeal against deportation on asylum and human rights grounds.

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2. The Appellant arrived in the UK on 10th December 1998 as a visitor and was granted leave to enter for six months. He returned to the UK in April 2001 and again was granted leave to enter as visitor for six months. On 22nd April 2002 he made an application for leave to remain which was refused in June 2003 and his appeal dismissed in June 2006. In August 2007 he made a further application for indefinite leave to remain which was refused on 8th September 2008. He was served with notice of liability as an overstayer and on 28th November 2008 he made an application for asylum.

3. The basis of the Appellant's asylum claim was that he could not return to Zimbabwe because he was in fear of being perceived as an MDC supporter as a member of the Ndebele tribe and because he had lived in the UK since 2000. He had come to the UK in 2000 because of difficulties his father was experiencing arising out of his activities as a journalist. On return his name would be linked with his father's work as a journalist and he would be perceived to support the opposition party. The Appellant never personally suffered harassment while in Zimbabwe. The Appellant was granted refugee status on 9th February 2009 for five years until 9th February 2014.

4. On 21st January 2011, at Cardiff Crown Court, the Appellant was convicted of robbery and possession of an imitation firearm with intent to cause fear of violence on two counts and sentenced to twelve years' imprisonment which was reduced to nine years on appeal.

5. The details of the offence are as follows: The Appellant travelled with three others from Aylesbury to Cardiff in possession of two very realistic imitation firearms with a single purpose to commit robbery. The victim was a young woman making her way home alone in the early hours of the morning. The CCTV footage showed that the four offenders went to Cardiff to commit crime and checked into a hotel previously booked using a false name and paid for using a cloned card. The offenders changed their clothing and were dressed in black. The judge was satisfied that the way the robbery was going to be achieved had been crystallised between the four of them. Two of the offenders got out of the car and followed the victim and confronted her. They demanded her property. One pointed the gun in her face and the other in her abdomen. One pulled her bag and they made their getaway in a car and travelled back to the hotel, changed into different clothes and tried unsuccessfully to extract money from an ATM using the stolen cards. The four offenders shared the common intention in coming to Cardiff to commit robbery using imitation firearms and they all played an equal part with different roles to achieve the aim needed.

6. A deportation order was signed on 5th March 2015. The Respondent decided that deportation was conducive to the public good pursuant to Section 32(4) of the Immigration Act 2007.

7. The Respondent concluded that even though it was accepted that the same party was in power when the Appellant was granted refugee status, in light of the country guidance case of CM (EM country guidance disclosure) Zimbabwe CG [2013] UKUT 00059, there had been a durable change since RN (Returnees) Zimbabwe CG [2008] UKAIT 00083. The Respondent confirmed that she had approached the UNHCR before making a decision to cease refugee status.

8. The Respondent concluded that Section 72(2) of the Nationality, Immigration and Asylum Act 2002 applied. This states that for the purposes of Article 33(2) of the Geneva Convention, a person is presumed to have been convicted by a final judgment of a particularly serious crime and constitute a danger to the community of the UK where he has been convicted in the UK of an offence and sentenced to a period of at least two years. The Respondent concluded that the Appellant was a present danger to society and issued a certificate under Section 72(9)(b) of the 2002 Act.

9. Article 33(2) states: "The benefit of the [non-refoulement] provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

10. Accordingly, the issues on appeal before the First-tier Tribunal were:

    (1) Whether the judge should uphold the Section 72 certificate;

    (2) Whether the Respondent's conclusion on the cessation of refugee status was lawful, and

    (3) Whether the Appellant's deportation was contrary to his right to family and private life under Article 8.

The decision of the First-tier Tribunal

11. In summary, the First-tier Tribunal judge upheld the certificate on the grounds that the writers of the probation reports had not read the sentencing remarks of the trial judge and had misunderstood the Appellant's role in the offence. The judge found the assessments were based on a misrepresentation of facts given by the Appellant, which continued right up until after he completed his courses, because the Appellant never corrected the questions posed to the probation officer.

12. The assessment of medium risk in 2013 was on the basis of only having a role after the offence took place, rather than being an equal part of a pre-planned joint enterprise. The judge found that the Appellant remained a significantly high risk to the public because it took him so long to admit his role, but that was not properly communicated to the probation officer. The Appellant had failed to rebut the presumption that he constituted a danger to the community.

13. The judge concluded that the Respondent had shown that the Appellant's refugee status may cease and he could avail himself of the protection available in Zimbabwe on the basis that she was bound to follow EM & Others (returnees) Zimbabwe CG [2011] UKUT 98 (IAC) "because it considered the evidence before it and concluded that the risk on return for certain categories had changed, and it is after such careful consideration of the evidence that it reached the conclusion, rather than a blanket approach advocated by the UNHCR. Therefore, because there has been such careful consideration of the evidence, and because this new country guideline case is authority for it being safe for the Appellant to return to Bulawayo in his country, I prefer to follow this authority."

14. The judge found that the interference with the Appellant's right to respect for private and family life was justified under Article 8(2) and there were public interest arguments which should prevail notwithstanding the engagement of Article 8.

Grounds of appeal

15. Permission to appeal was sought on three grounds. Firstly, that the First-tier Tribunal judge's conclusions on the risk assessment were irrational and failed to take into account material matters. In substituting her view for the professional risk assessors the judge failed to take into account the fact that the Appellant had no previous convictions, no internal prison disciplinary convictions, he was an enhanced prisoner, he had completed numerous offending programmes, he fully complied with his licence and he was not involved in criminal behaviour.

16. Secondly, the judge erred in concluding that she was bound to follow the country guidance case of EM. She had failed to properly direct herself on the correct test in relation to cessation of refugee status, namely whether there had been a fundamental and durable change across the country of origin.

17. Thirdly, in relation to Article 8, the judge's conclusion that the risk of reconviction was higher than assessed had affected her conclusions under Article 8. She had failed to properly apply Danso v Secretary of State for the Home Department [2015] EWCA Civ 596 in failing to give adequate reasons for why the Appellant's rehabilitation was not unusual.

18. Further, in determining very compelling circumstances she had failed to have regard to Maslov v Austria [2009] INLR 47. The criteria set out therein, namely the nature and seriousness of the offence committed by the applicant, the length of the applicant's stay in the country from which he or she is to be expelled, the time elapsed since the offence was committed, the applicant's conduct during that period, the solidity of social, cultural and family ties with the host country and with the country of destination. Following the Secretary of State for the Home Department v AJ (Angola) [2014] EWCA Civ 1636, the judge should have given due respect to the guidance in Maslov.

19. Permission was granted by Upper Tribunal Judge Lindsley on 13th October 2015 on the grounds that it was arguable that the First-tier Tribunal had made irrational or erroneous findings in relation to the risk assessment reports; secondly, that she had erred in law in applying the wrong test in determining the cessation of refugee status; thirdly, the Article 8 assessment was flawed because of the errors in relation to the expert evidence regarding risk, in the consideration of the Appellant's 'unusual' level of rehabilitation, and in looking at the issue of 'very compelling circumstances'.

20. I propose to deal with each of the grounds in turn setting out the submissions made by each party, the findings of the judge, where necessary, and my findings and conclusions.

Ground 1 – the section 72 certificate

The Appellant's submissions

21. Mr Reynolds submitted that the probation reports assessed the Appellant at low risk of reconviction and medium risk of serious harm. At paragraph 46 the judge assessed the risk of reconviction as higher than low and at paragraph 33 the risk of harm sufficiently high, notwithstanding the probation assessment.

22. Mr Reynolds relied on the case of (Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 00338) in which the First-tier Tribunal held that Section 72 creates statutory presumptions that an individual convicted of a serious crime is a danger to the community. These presumptions relate to certain offences committed in the UK and abroad. The presumptions are rebuttable by evidence.

23. In the case of Mugwagwa, the evidence before the Tribunal concerning the Appellant's risk to the community, including the risk of reoffending, was in the OASys Report which stated that risk of reconviction for non-violent or sexual offences within two years was low. The Appellant in that case had been convicted of an offence of conspiracy to supply heroin and it was accepted by the Respondent that the evidence in the OASys Report rebutted the presumption that the Appellant was a danger to the public.

24. Mr Reynolds relied on this case to demonstrate that an assessment of low risk of reoffending in an OASys Report was sufficient to rebut the presumption under Section 72(2).

25. In the Appellant's case the OASys Report of Mr Ling was dated 24th February 2015. Mr Reynolds referred to page 7, paragraph 2.1 and submitted that it is clear that the probation officer appreciated that the Appellant was part of a joint enterprise. The judge's findings at paragraph 25 were that Mr Ling had not appreciated the Appellant's part in the joint enterprise and that he had accepted, at face value the account told to him by the Appellant. The interpretation at paragraph 25 was not open to the judge on reading page 7, paragraph 2.1 of the OASys Report.

26. From page 8, paragraph 2.8 of the probation report it was clear that Mr Ling understood that the Appellant was minimising his involvement and at page 9, paragraph 2.14, that the Appellant was still denying his involvement. It was clear from these paragraphs that Mr Ling's report was an objective assessment. Mr Ling was well aware that what the Appellant was saying was inconsistent with his conviction. The judge wrongly concluded that Mr Ling's assessment was subjective and based purely on the Appellant's account to him in that interview.

27. Mr Ling concluded, at page 40, R10, that the Appellant had not committed the actual robbery and therefore he was not at high risk. The probation officer accepted that the offence was a serious one and the Appellant had been involved in a joint enterprise.

28. In his letter of 22nd July 2015, Mr Ling confirmed that the Appellant was at medium risk of causing serious harm because he had not actually threatened the victim and perpetrated the robbery.

29. The judge had erroneously rejected the professional assessment of the probation officer. Had the judge properly taken into account the matters referred to in the OASys Report she would have come to a different conclusion. The presumption in Section 72(2) was rebutted on the basis that the Appellant was at low risk of reoffending.

The Respondent's submissions

30. Ms Sreeraman relied on the Rule 24 response and submitted that the judge properly directed herself in relation to Section 72. When assessed holistically paragraphs 14 to 32 gave clear and cogent reasons why the certificate should be upheld. At paragraph 18 the judge took into account the case of Mugwagwa and acknowledged at paragraph 19 that the Appellant's account was at odds with the sentencing remarks.

31. The probation officer's assessment in the OASys Report was based on the Appellant's account even though he was aware that the Appellant was convicted of a joint enterprise. The level of the Appellant's involvement was not reflected in the account he gave to the probation officer and the Appellant did not take responsibility for its absence. The probation officer's assessment of risk was flawed in that he had not taken into account the sentencing remarks.

32. It was accepted by Mr Reynolds that the probation officer had not taken into account the sentencing remarks and Mr Ling had provided a witness statement to that effect which was submitted with Mr Reynolds' skeleton argument dated 27th January 2016.

33. Ms Sreeraman submitted that the judge had given clear reasons why, in view of the entirety of the evidence, the Appellant was at medium risk of harm and the certificate was made out. The challenge to the judge's finding was that the judge's conclusions on the assessment of the report were irrational. The judge in fact found at paragraph 26 that the probation assessments were less than reliable because they depended on the Appellant's account and he has sought to distance himself from the offence. On reading the probation reports the failure to have regard to the level of the Appellant's actual involvement made those reports less reliable. This finding was open to the judge on the evidence and there was no error in relation to Section 72.

The Appellant's reply

34. Mr Reynolds submitted that the real issue between the two parties was whether the probation officer just accepted the Appellant's account or whether he recorded what the Appellant was saying and objectively interpreted his account. When the letter of 22nd July 2015 and the OASys Report were read together it was clear that the judge's findings were irrational. The letter dated 22nd July 2015 was consistent with the judge's sentencing remarks. The Appellant was involved in a robbery offence and Mr Ling fully understood the Appellant's role. It was not open to the judge to say that the probation officer did not. It was incorrect for the judge to find that the probation officer had accepted the Appellant's account of the offence.

Conclusions on the section 72 certificate

35. It is accepted that the probation officer, Mr Ling did not have sight of the sentencing remarks prior to writing the OASys Report or his letter of 22nd July 2015. I am not persuaded by Mr Reynolds' submission that the letter of 22nd July 2015 was entirely consistent with the judge sentencing remarks. The judge's sentencing remarks are set out in paragraph 5 above. In his letter of 22nd July 2015 Mr Ling makes the following responses to the questions posed:

> "*Was Mr Madaka the ring leader?*
> Mr Madaka was not identified as being the ringleader during the commission of the robbery offence. He did not engage in the initial robbery act though involved himself in the attempt to withdraw money from the victim's bank accounts knowing that the cards had been taken during a robbery.
> *Whether you think he is a danger to the public or not?*
> Mr Madaka is assessed as presenting with a medium risk of causing serious harm to members of the public given his involvement in a robbery offence which involved the victim being threatened with weapons (BB gun)."

36. I find that the questions do not address the differences in the Appellant's account and the sentencing remarks of the judge and Mr Ling's answers do not demonstrate an understanding of the Appellant's role in the offence consistent with the basis upon which the judge sentenced him.

37. At paragraph 19 of the decision, the judge refers to paragraph 2.1 page 7 of the OASys report:

> "In the OASys Report Darren Ling writes that no PSR was completed in this case and details were provided by the Appellant during interview. The account given to the probation officer is at odds with that set out at length by the sentencing judge and repeated by me at length for this decision. The Appellant told the probation officer that they went to Cardiff to buy a new car, they arrived too late to go to the garage so they checked into a hotel. That evening they were driving around looking for a student bar when two offered to get out and ask for directions. He remained in the car and when the other two returned one was carrying a woman's handbag which was the first the Appellant knew of the robbery. He denied being aware that there were guns in the car although he admitted having seen them at the home of one of the other offenders. He felt stuck in Cardiff and helpless. The probation officer writes that he is aware that the CCTV footage confirms that there were only two offenders directly involved in the actual robbery but all four received long sentences as part of a joint enterprise and the Appellant appealed his sentence which has not been approved by a single judge. The probation officer is aware that

the vulnerable victim was alone, and had two guns pointed at her face and chest area."

38. At paragraphs 20 and 21 of the decision, the judge refers to paragraphs 2.14 (page 9) and 7 (page 15) of the OASys report.

"In the original OASys the Appellant still denied any knowledge that the index offence was to take place and could offer no explanation as to why the robbery took place. He denied being influenced by his peers."

"In the original OASys it reads that it remains unclear whether or not the Appellant knew that the robbery was planned and because the Appellant was seen withdrawing cash he was not entirely innocent."

39. On reading the OASys Report and the letter of 22nd July 2015, it would appear that the probation officer was of the view that the Appellant's role in the offence started after the robbery was committed when he used the victim's bank card and tried to withdraw money from an ATM. It is clear from the judge's sentencing remarks that it was found that the Appellant was involved with the planning of the offence and was well aware that a robbery was about to take place.

40. It is not clear from reading the OASys Report that the probation officer has approached the assessment of risk on a basis different to that set out to him by the Appellant. He might well have done, but the question is whether the judge's conclusion that he had not done so was one which was reasonably open to her.

41. I am not satisfied on reading the OASys Report and the letter of 22nd July 2015 that the judge's conclusion can be said to be perverse. It was clearly apparent that the sentencing remarks were not taken into account and the probation officer has confirmed this. The Appellant's account was vastly different to the basis upon which he was sentenced. It is not clear from reading any of the sections of the OASys report that the probation officer does not accept the Appellant's account and he appears to approach the risk assessment on the basis that the Appellant's involvement in the offence came some time after the robbery. That interpretation of the report was one which was open to the judge on the evidence before her and it cannot be said to be irrational.

42. Nor can it be said that an assessment in the OASys Report, that the Appellant was at low risk of re-offending and medium risk to the public, was sufficient to rebut the presumption under Section 72(2). The case of Mugwagwa is not authority for that proposition. On the facts of that particular case, the Respondent conceded that the evidence in the OASys report rebutted the presumption.

43. At paragraph 18 and 27 of the decision under appeal, the judge acknowledged that the Appellant was an enhanced prisoner with no adjudications and an exemplary custodial record. He complied with the sentencing planning process and completed a number of offending behaviour programmes. The Appellant had fully engaged with his licence and there was no negative behaviour in prison. He had been involved in no other criminal activity or behaviour.

44. The judge, in assessing whether there was evidence to rebut the presumption in section 72(2), took into account all the evidence before her and concluded that it was insufficient to rebut that presumption. This finding was open to the judge on the evidence and I am not persuaded that it was irrational, as submitted by Mr Reynolds.

45. The judge’s conclusion that she placed little reliance on the probation report was not unreasonable in the circumstances and therefore her conclusions at paragraphs 25 to 33 were not perverse. There was no error of law in relation to ground 1, the section 72 certificate.

Ground 2 – cessation of refugee status.

The Appellant’s submissions

46. Mr Reynolds relied on his skeleton argument which was dated 22nd January 2016 and he referred me to paragraphs 34 to 39 of the judge’s decision. He submitted that the country guidance case of EM did not deal with the cessation of refugee status. It considered the loyalty test and whether there had been a change in relation to that test in that it was no longer prevalent.

47. The judge acknowledged that the Respondent’s decision on cessation did not appear to follow the UNHCR guidelines as it did not deal with border issues, namely fundamental and widespread change and whether protection was available. Mr Reynolds submitted that the Respondent had not proved fundamental change for the three reasons set out at paragraph 22 of his skeleton argument, namely that Mugabe and ZANU-PF remain in power and continue to persecute persons without ZANU-PF connections.

48. The UNHCR letter dated 8th October 2014 in respect of the proposed cessation of the Appellant’s refugee status highlighted a number of then recent reports and suggested that serious protection concerns persisted in Zimbabwe. The Respondent had not proved that there had been widespread change in circumstances across Zimbabwe because the country guidance cases of EM and CM showed exactly the opposite. Persons continued to be at risk in high density areas in the capital Harare and in Matebele and north and south.

49. The Respondent had not proved that the actors of persecution had taken responsible steps to prevent persecution on the basis of what was in the country guidance cases, namely that ZANU-PF continued to engage in persecution not only of persons with significant MDC profiles but other persons without ZANU-PF connections. The judge had erred in law because EM was not binding authority and the Respondent had failed to show fundamental widespread change or that persecution had ceased.

50. Following the country guidance it was safe for the Appellant to return to Bulawayo. However, the Respondent had not proved the element which needed to be established for cessation which was fundamentally different from the recognition of refugee status. Further, the judge's conclusion was contrary to the letter from the UNHCR which stated that the change was not fundamental or durable to warrant cessation in the Appellant's case. Although the judge preferred the country guidance to the opinion of the UNHCR she was not entitled to do so because she was not applying the correct test for cessation. She had failed to apply the test of whether the Respondent had proved fundamental and durable widespread change and whether there was effective protection available.

The Respondent's submissions

51. Ms Sreeraman submitted that the Respondent had demonstrated that refugee status had ceased. The UNHCR guidelines were not binding but persuasive. The judge had assessed the reasons given in the refusal letter as to why there had been durable and fundamental change. She had regard to the relevant factors and the Respondent had given sufficient reasons to show that the test was made out. There was sufficient evidence to show that the changes in Zimbabwe were durable and fundamental and the judge had given sufficient reasons for her conclusions. The judge was entitled to consider current country guidance in deciding whether there had been a fundamental and durable change.

The Appellant's reply

52. Mr Reynolds submitted that the judge acknowledged the Respondent's failure to follow the UNHCR guidelines and that the Respondent had failed to say that cessation requirements were met. The judge found that there was a conflict between the country guidance and the guidelines. However, there was no conflict because the issue before her was one of cessation and therefore she was not bound by EM since it did not deal with cessation requirements.

Conclusions on cessation of refugee status

53. I have had regard to the matters set out in the Appellant's skeleton argument in relation to the UNHCR guidelines on international protection and cessation of refugee status. In particular, the principle that conditions within the country of origin must have changed in a profound and enduring manner before cessation can be applied. For cessation to apply the changes need to be of a fundamental nature such that the refugee can no longer continue to refuse to avail himself of the protection of the country of his nationality. Another crucial question is whether the refugee can effectively re-avail him or herself of the protection or his or her own country. Such protection must therefore be effective and available.
54. In contrast, changes in the refugee's country of origin affecting only part of the territory should not in principle lead to a cessation of refugee status. Refugee status can only come to an end if the basis for persecution is removed without the precondition that the refugee has to return to specific safe parts of the country in order to be free from persecution, also not being able to move or to establish oneself still in the country of origin would indicate that the changes have not been fundamental.

55. In SB (cessation and exclusion) Haiti [2005] UKIAT 00036, the IAT considered the UNHCR guidelines and came to the following conclusions:

> [26] The adjective fundamental is really no more than an encapsulation of the wording of the clause itself because it is treated as requiring the changes to have addressed the causes of the displacement which led to the grant of refugee status in the first place.
>
> [28] The guidelines do not require a particular level of good and democratic governance to be achieved. It is the avoidance of predictable return to the conditions of persecution which must be shown as a result of the changes relied on. It is for that reason that the UNHCR does not see the clause being used in respect of individuals usually because of changes which affects groups of refugees which will be more enduring and fundamental.
>
> [29] Paragraph 13 [of the guidelines] deals with the enduring and stable relationship with that fundamental change. We agree that temporary changes in a situation of volatility do not suffice. Time should be allowed for the changes to consolidate so as to show their durability.

56. At paragraph 37 of SB the IAT held:

> "Aristide's return to power had been a fundamental change; it removed the basis of the persecution risk to this individual underlying the grant of asylum. We do not accept that it is a legal requirement for the operation of the cessation clause that there be functioning institutions and rights provisions, as the indicators in the guidelines appeared to require. We agree, however, that the absence of such institutions makes the prediction of stable and enduring change a more fragile exercise of judgement."

57. In considering whether there has been a fundamental and widespread change and whether there was indeed sufficiency of protection the judge was entitled to consider current country guidance. The country guidance case of EM shows that there has been a change and that certain categories of refugees would not be at risk of return.

58. In EM the Tribunal held that the evidence did not show as a general matter, the return of a failed asylum seeker from the UK, having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to the Zanu-PF. Further, a returnee to Bulawayo will in general not suffer the adverse attention of Zanu-PF, including the security forces, even if he or she has a significant MDC profile.

59. The Appellant was from Bulawayo and the Respondent proposed to return him there. The Appellant was not politically active within the MDC. Although his father was a journalist, it was not accepted that his father had been detained or that he was suspected of working for the opposition. In his father's appeal, the judge found that the Appellant's father came to the UK to join his family, not because he feared persecution from the authorities or because he was a supporter of the MDC.

60. The judge found that the Appellant was granted refugee status in line with RN (Returnees), but following EM the situation had changed and the Appellant would no longer be at risk of harm on return.

61. Therefore the reasons for the grant of refugee status no longer existed in relation to this Appellant and there was no error of law in the judge's conclusion that the Respondent had shown that the Appellant's refugee status should cease and he could avail himself of protection.

62. I am not persuaded that the judge failed to take into account the position of the UNHCR since she specifically referred to it. She is entitled to prefer the situation as set out in the country guidance case in preference to that set out in the letter from the UNHCR on the Appellant's behalf. She considered all the evidence before her and her findings were open to her on that evidence. On reading paragraphs 34 to 41 it is clear that the judge properly directed herself on the correct test.

63. In any event, there was no challenge to the judge's finding that it was safe for the Appellant to return to Bulawayo. Therefore, given my conclusion that there was no error of law in relation to judge's decision to uphold the section 72 certificate, any error of law in relation to the cessation of refugee status would not be material, given that the Appellant's return to Bulawayo would not breach Articles 2 or 3. There was no material error of law in relation to ground 2, cessation of refugee status.

Ground 3 – Article 8

The Appellant's submissions

64. Mr Reynolds relied on paragraph 15 of the grounds of appeal and the fact that the risk of reoffending was flawed for the reasons already given. Further, the judge had erred in his application of Danso because the Appellant's rehabilitation was out of the ordinary and unusual given the matters referred to. There were very compelling circumstances and the judge had failed to apply the principles set out in Maslov in assessing those. It was five years since the commission of the offence and the Appellant's conduct since then was exemplary. The judge had not applied the Maslov principles to the facts set out in paragraph 46 and had not given sufficient weight to those factors. The Appellant would have no accommodation and no support in Zimbabwe where employment prospects were poor.

The Respondent's submissions

65. Ms Sreeraman submitted that the judge had appropriately directed herself in accordance with AJ (Angola). She had taken into account the gravity of the offence and given cogent reasons for why deportation outweighed the Appellant's Article 8 rights. There was not just the risk of reoffending but also revulsion at the commission of the Appellant's offence. There was no flaw in the assessment of Article 8. The Appellant's case could be distinguished from Maslov on its facts and therefore the principles set out therein were not applicable. The judge had conducted a correct assessment and dealt with all relevant factors.

The Appellant's reply

66. Mr Reynolds submitted that the judge had not applied the principles in Maslov and AJ (Angola) was authority that there should be a consideration of these factors in deciding whether there were compelling circumstances. This had not happened in the Appellant's case.

Conclusions on Article 8

67. In relation to the Article 8 claim the judge referred to Chege (Section 117D – Article 8 – approach) [2015] UKUT 00165 and took into account the submissions by Mr Reynolds that there were very compelling circumstances over and above paragraph 399 and 399A of the Immigration Rules, namely: the Appellant has no previous convictions; received no internal prison disciplinary offences; was an enhanced prisoner; completed numerous offending behaviour programmes including Victim Awareness and Restore/Sorry Project; completed educational programmes including teaching English as a Foreign Language; complied

fully with his licence; low risk of reconviction; works with the Forgiveness Project Charity; volunteer at the Brethren Christ Church; was awarded the Hardman Trust Award Scheme in recognition of his serious commitment to personal rehabilitation; was undertaking Railway Engineering Training with the London Skills and Development Network following a formal assessment and all his family, including parents and siblings live in the UK; his mother suffers diabetes and neuropathy and will be shortly retiring.

68. The judge's finding that the above circumstances were not compelling was open to her on the evidence. The judge clearly took into account all the matters referred to in Maslov at paragraph 45 although she failed to refer to the case itself. All the principles set out therein are subsumed in her assessment at paragraphs 42 to 50.

69. The judge took into account the Appellant's rehabilitation and his exemplary behaviour since the commission of the offence five years ago. The Appellant was released in February 2015. However, the judge properly weighed the public interest given the serious nature of the offence and concluded that the compelling circumstances were insufficient to outweigh the public interest.

70. The judge found at paragraph 51: "Therefore, taking into account paragraph 117A-D of the Immigration Act 2014 and following the approach as advocated by Chege in paragraph 30 to ensure a full and proper assessment of the UK's obligations under Article 8, I conclude that the interference with the Appellant's right to respect for private and family life is justified under Article 8(2) and there are public interest arguments which should prevail notwithstanding the engagement of Article 8."This finding was open to her on the evidence before her. There was no error of law in relation to ground 3, Article 8.

Conclusion

71. Accordingly, I find that there was no material error of law in the judge's decision which was promulgated on 19th August 2015 and the Appellant's appeal is dismissed.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

Signed **J Frances** Date: 26th February 2016

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed **J Frances** Date: 26th February 2016

Upper Tribunal Judge Frances