Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01530/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral Decision given following the hearing On 12 December 2017	On 16 March 2018

Before

THE HONOURABLE MR JUSTICE GOSS
UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR TASHINGA ALVIN MUSANDU
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant (Secretary of State): Ms A Everett, Senior Home Office Presenting Officer
For the Respondent (Mr Musandu): Mr M Walsh, Counsel, instructed by The Trent Centre for Human Rights

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Robson who had allowed Mr Musandu's appeal against the Secretary of State's decision to deport him. For ease of reference I shall throughout this decision refer to the Secretary of State who was the original respondent as "the Secretary of State" and for Mr Musandu, who was the original appellant, as "the claimant".

2. This appeal has had a long and unfortunate history because a previous decision of the First-tier Tribunal in which the Secretary of State's decision

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to dismiss the claimant's appeal had been dismissed was set aside due to procedural irregularity. The precise reasons why this decision was set aside are not relevant for the purposes of this hearing.

3. The facts can be set out relatively briefly. The claimant arrived in the UK in August 1999 with his mother who had previously been in the UK and then returned to Zimbabwe. At the time the claimant was 7 years old. Regrettably from a very early age the claimant started offending. In 2007, when he would have been 14 or 15 years old, he was cautioned for common assault. In August 2009 he was involved in an attempted robbery and common assault and in September 2009 he threatened harm to a witness on a jury. Then in January 2010 in respect of further offences he was sentenced to eight months' detention and training. The following month he was convicted of an offence of wounding at Nottingham Magistrates' Court and sentenced to ten months' detention and training.

4. On 24 June 2010 the Secretary of State wrote to the claimant warning him that deportation would be considered and would be considered in the future. Thereafter on 30 May 2012 the appellant was convicted of very serious offences indeed of robbery and attempted robbery in respect of which, despite his relatively youthful age (he was just 20), he was sentenced to eight years at a young offender's institution. While the claimant was serving his sentence the Secretary of State wrote to him informing him of the deportation order which was dated 14 July 2015. The basis of the decision was that removal was conducive to the public good as provided within Section 3(5)(a) of the Immigration Act 1971 because pursuant to Section 32(5) of the UK Borders Act the Secretary of State must make a deportation order in respect of foreign criminals unless one of the Exceptions set out within Section 33 applies. The claimant had been previously served with a notice of liability for automatic deportation following his sentence, on 5 August 2012, and by the time of the notice of decision he had not responded to that notice.

5. As already noted the claimant appealed against this decision and the original decision dismissing the appeal was set aside and so his appeal came before First-tier Tribunal Judge G R J Robson, sitting at Bradford Magistrates' Court on 10 July 2017. In a decision and reasons promulgated on 21 August 2017, for reasons which will be set out briefly below, Judge Robson had felt obliged to allow the appeal and it is in respect of this decision that the Secretary of State now appeals, leave having been granted by First-tier Tribunal Judge Baker on 31 October 2017.

6. Judge Robson in his decision considered whether the claimant would be entitled to remain in this country on human rights grounds (and if he would then the decision to deport would be unlawful under Section 33 of the UK Borders Act, being in breach of the ECHR) but it is clear from the decision that having considered the relevant paragraphs of the Immigration Rules he concluded that his removal would not be unlawful under Article 8. He sets out the relevant provisions from paragraph 78

onwards. At paragraph 79 he sets out paragraph 398 of the Immigration Rules and he also sets out the other relevant Rules, including reference to paragraphs 399 and 399A subsequently. The findings of fact include at paragraph 89 that "in relation to his daughter, I am not satisfied that the best interests of that child will be served by the [claimant's] continued residence in the United Kingdom".

7. He refers to Section 117C of the Nationality, Immigration and Asylum Act 2002, inserted by the Immigration Act 2015, and notes that the sub-paragraphs relevant in this case apply to all ECHR Article 8 claims for foreign criminals decided on or after July 2015, as is the case here. However having considered all the evidence (and of course this is a case where the claimant is to be deported if the Secretary of State's decision is upheld on the basis that he has been sentenced to a period of imprisonment of over four years), he concludes at paragraph 96 that "in view of what I have found above, I conclude there will be no exceptional compelling reasons for the appellant to remain in the United Kingdom, despite the length of his presence here and his integration into this country". He makes this finding having considered the best interests "not only of the appellant's but also the other children involved", finding in terms, "that their best interest would [not] be breached by removal of the appellant".

8. In other words, it is abundantly clear from the decision that so far as the merits of the application are concerned there is no basis on human rights or any other grounds why the decision of the Secretary of State could be said to be unlawful.

9. However, in four short paragraphs thereafter (paragraphs 99 to 102) the judge then goes on to allow the appeal because, at paragraph 102, of his finding as follows:

> "102. I therefore, in respect of my findings above, solely because I am bound by the decision in *JM [Zimbabwe],* reluctantly allow the Appeal on human rights grounds only".

10. This is a reference to *JM (Zimbabwe)* [2016] EWHC 1773, (Admin) (a decision of Jay J) in which the judge had been considering whether or not a decision under Section 35 of the UK Borders Act 2007 requiring the applicant in that case to cooperate with the Secretary of State by giving consent to his return to Zimbabwe if requested to do so was unlawful. In that case Jay J had concluded that that was not, although he made it clear at paragraph 137 that "Nothing in my judgment should be interpreted as condoning the Claimant's continued unlawful presence in the UK, at public expense".

11. The judge clearly considered that because the court in *JM (Zimbabwe)* had concluded that the applicant in that case could not be forced to return to Zimbabwe, that meant that this appeal had to be allowed, but his finding that for this reason he was obliged to allow the appeal on human rights grounds is in the submission of the Secretary of State, not only not

adequately reasoned but simply wrong. Before us, on behalf of the claimant Mr Walsh, consistent with his obligations as Counsel, stated that although he could not concede the point there was no basis upon which he could legitimately argue that the judge's reasoning was sustainable. The fact that somebody cannot practically be returned does not make unlawful a decision to deport him. In our judgment Mr Walsh was clearly right to concede that such a submission would be unarguable. As long ago as 2005, in *R v SSHD (ex parte Khadir)* [2005] UKHL 39 the House of Lords had found that where a decision was made to remove a person in circumstances where that removal was not at that time practical, there was nothing unlawful about the decision itself which could remain in place pending such time as circumstances in the host country might change. In this case the judge appears to have incorrectly concluded that Mr Justice Jay was saying something different, whereas all he was concluding was that the Secretary of State could not lawfully require an applicant to cooperate in seeking travel documents. There is nothing in that decision to make unlawful the deportation decision itself, as Mr Walsh accepted was the case although not formally conceding the point.

12. Although there is a document before the court, submitted on behalf of the claimant, seeking to cross appeal the decision, Mr Walsh formally withdrew any cross appeal to the extent that one was before the Tribunal recognising that it could not possibly succeed. Again we concur with his decision; the findings of fact which the judge made were on the facts of this case inevitable. This claimant, in light of his extremely serious criminal offending, could not possibly persuade anyone that there are exceptionally compelling reasons his deportation would not be proportionate and there was nothing before Judge Robson which could possibly persuade him otherwise. It follows that we must set aside Judge Robson's decision as containing a material error of law (that is his incorrect interpretation of what had been decided in the first instance of the decision of *JM (Zimbabwe)*) and in the circumstances of this case, we are able to remake the decision without further hearing because it is not now suggested before us that there is any meaningful or material error in the factual findings which the judge made with regard to the Article 8 position. The highest that Mr Walsh seeks to put the claimant's case is that it might be appropriate, given the mistake made with regard to *JM (Zimbabwe)*, to send the whole appeal back to the First-tier Tribunal for further consideration, but as in our judgment the factual findings which the judge made are sustainable, and in light of these findings there is no basis upon which the claimant's appeal could succeed, this is not an appropriate course to follow. Accordingly we remake the decision as follows:

<u>Notice of Decision</u>

We set aside the decision of First-tier Tribunal Judge Robson as containing a material error of law and substitute the following decision:

The claimant's appeal against the Secretary of State's decision to deport him is dismissed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 14 March 2018