Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00132/2016**

THE IMMIGRATION ACTS

Heard at Birmingham	**Sent to parties on:**
On 28th September 2018	**On 8th November 2018**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MS

(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr T Royston	(Counsel)
For the Respondent:	Mrs H Aboni	(Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the Upper Tribunal, from a decision of the First-tier Tribunal (hereinafter "the tribunal") which it made on 17 July 2017 following a hearing of 26 May 2017; whereupon it dismissed his appeal from a decision of the Secretary of State, of 16 September 2016, to deport him.

2. For the reasons which I have set out below, I have concluded that the decision of the tribunal involved the making of material errors of law and that, accordingly, that decision shall be set aside (see section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007). I have also decided to remit the case to the tribunal for reconsideration (section 12(2)(b)(i)).

3. The tribunal decided to make an anonymity direction with respect to the claimant. I have decided to continue the grant of anonymity because the claimant asserts (rightly or wrongly may have to be decided in future) that he would be at risk if he were to be returned to Zimbabwe and identifying him in a public document might (I do not say will) enhance any such risk if there is any.

4. Shorn of all but the essentials, the background circumstances are as follows: the claimant is a national of Zimbabwe and he was born on 24 March 1989. As I understand it his family lived in Lobengula West which I think is either close to or a part of Bulawayo (see paragraph 16 of the determination of Adjudicator Pugh (as she then was) which promulgated on 7 August 2002). On 12 March 2002, whilst he was still a child, his mother arrived in the United Kingdom (UK) and claimed asylum, stating that she was at risk because of her support for and involvement with the Movement for Democratic Change (MDC). Although her claim was initially refused that was overturned on appeal (the decision of Adjudicator Pugh) and on 13 September 2002 she was granted indefinite leave to remain in the UK as a refugee. The claimant applied to come to the UK for settlement as the child of a refugee, seeking to bring himself within the terms of rule 352D of the Immigration Rules. That application was successful and he entered on 21 February 2004. He went on to commit criminal offences culminating in an offence of robbery in respect of which he received a sentence of eight years imprisonment on 28 September 2012. He unsuccessfully attempted to appeal the length of his sentence.

5. The Secretary of State communicated with the claimant concerning his conviction for robbery and the relevance that conviction had to his immigration status. On 19 November 2012 he was informed, in writing, that he was liable to what is known as "automatic deportation". His then representatives wrote to the Home Office stating why it was considered he should not be deported. Eventually, the claimant was sent a document (which is in the form of a letter) headed "Notice of Decision" and bearing a further heading "Decision to Deport, Cessation of Refugee Status, and to Refuse Human Rights Claim" which is dated 16 August 2016. I pause here to observe that the Secretary of State has, throughout, proceeded on the basis that the claimant is in fact, in consequence of the basis upon which he was permitted to enter and remain in the UK, a refugee himself. That was something which was raised by the tribunal but the Secretary of State did not change his stance. I say no more about it. A part of the letter of 16 August 2016 was given over to an explanation as to why the Secretary of State had concluded that the claimant's refugee status had "ceased". It was said that the circumstances in connection with which the claimant had been recognised as a refugee had ceased to exist such that he could no longer continue to refuse to avail himself of the protection of the country of his nationality. Thus, and on that basis, the Secretary of State said it had been decided to revoke his grant of asylum. In connection with that, the Secretary of State relied upon paragraph 339A of the Immigration Rules and, in particular, 339A(v). The provisions in that Immigration Rule mirror those within Article 1C(5) of the 1951 Refugee

Convention. (I shall, from now on, call this the "cessation aspect"). A part of the letter was given over to explaining why the Secretary of State was also revoking refugee status in consequence of the claimant's offending and what could be concluded from it. Here, the Secretary of State had in mind Article 33 of the 1951 Refugee Convention which lays down a general rule that a refugee should not be returned to a place where he would be at risk on account of his race, religion, nationality, membership of a particular social group or political opinion but says that amongst other things that such protection cannot be claimed by a refugee who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of the country where he seeks or has been given refugee status. That provision is reflected in rule 339A(ix) and (x) of the Immigration Rules. Also relevant is section 72 of the Nationality, Immigration and Asylum Act 2002. (I shall from now on call this the "revocation aspect").

6. The significance of the above was that, according to the Secretary of State, the claimant was no longer able to claim the protection of the Refugee Convention in seeking to resist deportation. So, that is why the Secretary of State went on to make the deportation order of 16 September 2016 referred to above.

7. As already indicated, the claimant's appeal to the tribunal was heard on 26 May 2017. Essentially, he argued that he could not be deported because he remained a refugee. The tribunal did not accept that contention. As to the cessation aspect, it decided that there had been a significant change in Zimbabwe such that the basis upon which refugee status had been granted no longer existed. It linked the claimant's immigration status to that of his mother (the person who had actually been granted asylum) and noted that she had succeeded on the basis that it had been accepted, at the material time, that even very low-level MDC supporters were likely to be at risk (see paragraph 85 of the tribunal's written reasons of 17 July 2017). But the tribunal, in explaining why it thought there had been, as it put it, "a significant change in circumstances in Zimbabwe" (see paragraph 97 of the written reasons), thought it important that immediately after his mother had fled Zimbabwe the claimant and his father had remained there; that there was no evidence that either had suffered harm in consequence of doing so; that the claimant had returned to Zimbabwe in 2012 for a funeral and that whilst he had faced some aggression from airport staff and had then had to pay money in order to pass through road blocks nothing worse had occurred even on his own account; and that any ill-treatment he had received did not pass the discrimination threshold. The tribunal concluded by saying of the above:

> " 99. That seemed to me to be compelling evidence that the appellant would not be at risk of persecution or serious harm in the event that he will return to Zimbabwe. He therefore no longer requires protection."

8. As to the revocation aspect, the tribunal spent some time noting the claimant's offending history and the evidence concerning the question of whether or not he posed a risk to the UK community. It noted the judge's sentencing remarks which made the seriousness of the claimant's offending undeniably clear. It noted the content of an OASys assessment which had recorded him as posing a "low risk in community" and contained the view that he posed a low risk of causing serious harm. It noted that he had become "an enhanced prisoner" during his time in custody, that he had gained some qualifications whilst in custody and that between the date of his release and his appearance before the tribunal (some nine months) there had been no further offending. But the tribunal had its concerns and said this:

> " 131. The appellant has a good record whilst in prison and there are many positive features highlighted in the OASys report. However, in that report, there was reference to the need for a proven period in the community. The appellant has been on bail for approximately nine months and there is no suggestion of any further offending. However, I do find it troubling that he attempts to distance himself from the offence and

> minimise his involvement which is not consistent with the sentence he received. That sentence was a long one which reflects the seriousness of the offence and which means that the appellant must produce significant evidence if he is to remit the presumption. I am not satisfied that such evidence has been produced."

9. The minimisation aspect was probably a reference to the claimant's assertions, as noted at paragraph 111 of the written reasons, that he had believed he and his accomplice were only going to the house where the offence took place in order to purchase cannabis and had not anticipated his accomplice would instigate a robbery. So, the tribunal decided that, since the claimant had received a sentence of at least two years (of course well in excess of that) and since he remained a risk to the community, he fell within the terms of Article 33(2) and section 72(2) of the 2002 Act such that he no longer had the protection of the Refugee Convention.

10. The rest of the tribunal's written reasons was given over to a consideration as to whether there was entitlement to humanitarian protection or protection on human rights grounds under Article 3 of the European Convention on Human Rights (ECHR), with a negative conclusion (from the claimant's perspective) as to each, and a consideration, with a similarly negative result, as to whether or not the claimant was able to rely upon the provisions of Article 8 of the ECHR, as incorporated within the Immigration Rules which relate to deportation, for the purposes of resisting such deportation. So, the claimant's appeal was dismissed.

11. That was not the end of the matter because the claimant, through his representatives, sought permission to appeal to the Upper Tribunal. The written grounds advanced were refreshingly concise. There were four grounds. The first two related to what I have called the cessation aspect. The remainder related to what I have called the revocation aspect. Ground 1 was effectively a contention that the tribunal had not considered whether any change to country conditions in Zimbabwe was "durable". Ground 2 was a contention that the tribunal had given irrational weight to the claimant's own experiences in Zimbabwe, and that of his relatives, when considering whether there had been any change in country conditions such as to justify the cessation of refugee status. Ground 3 was a contention that the tribunal had misdirected itself when stating that only "significant" evidence could be relied upon under section 72(6) of the Nationality, Immigration and Asylum Act 2002 to rebut the statutory presumption as to danger to the community. Ground 4 was a contention that the tribunal had inadequately reasoned out its conclusion that, in the face of all of the evidence some of which was favourable to the claimant, the claimant continued to constitute a danger to the community. Permission to appeal was originally refused by a Judge of the First tier Tribunal but, as indicated above, it was granted by a Judge of the Upper Tribunal. The grant was not limited though it is fair to say that the granting judge appeared to favour the latter two grounds over the first two.

12. Permission having been granted there was a hearing before the Upper Tribunal (before me) so that it could be decided whether the tribunal had erred in law and, if so, what should flow from that. Representation was as stated above and I am grateful to each representative. As I indicated to the parties at the end of the hearing, I have concluded that the tribunal, despite its very thorough evaluation of the evidence before it and the legal provisions which it had to consider, did err in law such that its decision has to be set aside. Having heard the views of the parties as to disposal, I have also decided to remit for reconsideration (a rehearing). I shall now explain why.

13. I shall start, logically I suppose, with Ground 1. The real point here, as argued by Mr Royston before me, amounts to a contention that the tribunal only considered whether the change in country conditions Zimbabwe was significant rather than whether it was both significant and non-temporary my underlining). Article 1C(5) of the 1951 Refugee Convention indicates that both are required. The tribunal was aware of the content of Article 1C(5) and that what was

required was a consideration as to both, as is apparent from what it had to say at paragraph 82 of its written reasons. But Mr Royston says, in effect, that it lost sight of that at paragraph 97 of its written reasons when it simply said that it was "satisfied that there has been a significant change in the circumstances in Zimbabwe" and then went on to explain why it thought that was so. But the written reasons do have to be read as a whole and, in my judgment, the tribunal did enough to demonstrate that it was aware of the true and full nature of the test it was required to apply. So, I have concluded that that ground, when taken in isolation, is not made out. However, it does connect, to some extent, with Ground 2 which relates to the matter of weight given by the tribunal to the claimant and his relatives experiences in Zimbabwe as highlighted above.

14. Generally speaking, of course, it is a matter for the tribunal to decide what weight it should give to particular components of the evidence which is before it. I approach matters from that starting point. But it is apparent from the way the written reasons are structured, that the tribunal was effectively deciding the question of whether there had been substantial and durable change largely if not wholly on the basis of those experiences. It is true that the tribunal carried out a careful assessment as to changes that there had been in Zimbabwe since the claimant's mother had come to the UK as reflected, perhaps most notably, in the important Country Guidance decision of the Upper Tribunal in *CM (EM Country Guidance: Disclosure) Zimbabwe CG* [2013] UKUT 59 (IAC) and in other background country material to which it referred. But having gone through all of that it did not draw any conclusions from it, at least with respect to durability of change, and its conclusion with respect to "significant change" was not actually explained or reasoned. In the circumstances and in light of the Country Guidance decision and the background country material to which it referred, it might well have been permissible for only a brief explanation to have been given but, in my judgment, there had to be something. So, the conclusions regarding that significant change (if one was reached) and regarding durable change rested almost exclusively upon the lack of difficulties amounting to persecution experienced by the claimant and his family in the immediate times after his mother had left, the brief visit into Zimbabwe made by the claimant in 2012 and visits made by his siblings in 2015. I am not sure whether Mr Royston was going so far as to suggest that those experiences were entirely irrelevant. If so I would disagree. It does seem to me that such experiences, particularly those concerning later visits to Zimbabwe, can have relevance but they are far from being determinative. In my judgment that evidence was, of itself, insufficiently strong to wholly bear the conclusions which the tribunal had reached concerning either significant change or durability. So, in effect I suppose, I am concluding that a combination of Ground 1 and Ground 2, when taken together, is made out such that the tribunal did err with respect to its consideration of the cessation issue.

15. As to Ground 3, the complaint relates to what the tribunal had to say at paragraph 131 of its written reasons when it was considering the question of whether or not the claimant had succeeded in rebutting the presumption which followed from his conviction and the length of his sentence, regarding the question of whether he was a danger to the community section 72 of the Nationality, Immigration and Asylum Act 2002. Having noted certain matters which weighed in his favour the tribunal then expressed the view, as already noted, that it was troubling that he had sought to minimise his involvement. It then observed that the sentence was a long one which reflected the seriousness of the offence and which meant that the claimant had to "produce <u>significant evidence</u> if he is to rebut the presumption" (my underlining). Mr Royston argues that that is, in fact, putting "a gloss" upon the test which has to be applied. I can certainly see what Mr Royston is getting at. Really, there simply has to be enough evidence to rebut the presumption. But I think perhaps the ground owes something to over-analyses. All that the tribunal was really seeking to say in context, in my view, was that trivial, trifling or unpersuasive evidence would not do. I do not think it was seeking to elevate the strength or quality of the evidence required to rebut the presumption and I do

not think it was really doing anything, despite perhaps very slight loose wording, other than to ask itself whether there was enough evidence to rebut the presumption in this case. So, I have not found that ground to be persuasive but I understand why it was raised.

16. As to Ground 4, again this involves what the tribunal had to say at paragraph 131 of the written reasons. But prior to that, as noted, the tribunal had set out certain evidence which it was reasonable to suppose might, at least from one view, assist the claimant in demonstrating that he might not still constitute a danger to the community. As I have already drawn attention to, there was a relevant OASys report, the claimant had obtained enhanced prisoner status, he had obtained some qualifications whilst in prison and he had not offended having been released. None of that necessarily meant that he did not still represent a danger to the community at all. But it was evidence capable of suggesting that he might not. In my judgment, against that background, in order to comply with the requirement to provide adequate reasons, the tribunal was required to say more than it did as to why, despite that evidence, it was concluding that he did remain a danger to the community. The tribunal's view (which may be correct) that the claimant had sought to minimise his degree of involvement in the offence was not sufficient of itself to bear that conclusion and, therefore, something further by way of explanation was required. So, I conclude that Ground 4 is made out.

17. It was the above which underpinned my decision to set aside the tribunal's decision. As to remittal, that was the course of action urged upon me by both representatives. Another option would have been for me to retain the case in the Upper Tribunal and to direct a further hearing in that forum. But I have attached weight to the views of each representative and concluded that, since I am setting aside the tribunal's decision, starting afresh is the better course and that can best be achieved by remittal. So, the appeal will be reheard afresh by the tribunal.

18. Prior to setting out some brief directions for the rehearing (they are brief because I do not wish to unnecessarily tread on the toes of the First-tier Tribunal) I would wish to offer a few non-binding observations which may assist the tribunal when it comes to consider the appeal by way of a rehearing.

19. The starting point for the tribunal will be the claimant's current possession of refugee status. Unless that status is, in some way, lost then he cannot be deported. So, if the Secretary of State is to succeed, he must demonstrate that either one or other of the bases he relies upon for effectively depriving the claimant of his refugee status applies. If the Secretary of State succeeds on what I have called the cessation aspect and if the claimant cannot otherwise demonstrate risk of persecution, risk of serious harm such as to give rise to entitlement to humanitarian protection or risk of Article 3 ECHR ill-treatment, then the case will effectively translate into an ordinary deportation one with matters being considered under the Immigration Rules with respect to deportation and Article 8 of the ECHR. If, however, the Secretary of State does not succeed on the cessation issue but does succeed on the revocation issue with reference to Article 33(2) of the Refugee Convention, then he will not be a refugee but it will still have to be considered whether there would, otherwise, be risk consequent upon his return in the context of humanitarian protection (though it may be argued his offending would cause him to lose entitlement to such a ground too) and Article 3 of the ECHR. If he cannot show such risk, then again matters would have to be considered under ordinary deportation/Article 8 grounds. At least that is how I see it. But I do not intend to be prescriptive and the tribunal might see it differently.

Directions for the rehearing

A. The decision of the First-tier Tribunal having been set aside, there will be a rehearing of the appeal before a differently constituted First-tier Tribunal. That rehearing shall take the form of an oral hearing.

B. The rehearing shall take place at the Birmingham Hearing Centre, that location being the most suitable for the claimant.

C. Matters such as the time estimate for the hearing, interpreter needs and any related issues shall be for the First-tier Tribunal.

D. These directions may be supplemented or amended at any time by any salaried Judge of the First-tier Tribunal in the Immigration and Asylum Chamber.

Decision

The claimant's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside. The case is remitted to the First-tier Tribunal for reconsideration by a differently constituted tribunal.

Signed: Date: 1 November 2018

Upper Tribunal Judge Hemingway

Anonymity

The claimant was previously granted anonymity by the First-tier Tribunal. I continue that grant under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. This applies both to the claimant and to the respondent. No report of these proceedings shall identify the claimant or any member of his family. Failure to comply may result in contempt of court proceedings.

Signed: Dated: 1 November 2018

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

Since no fee is payable there can be no fee award.

Signed: Date: 1 November 2018

Upper Tribunal Judge Hemingway