Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06184/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 November 2013	**On 12 December 2013**
Prepared 8 November 2013	

Before

LORD BOYD SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMUEL RUPIYA

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Ms A Masolo, of Messrs C K Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Wyman who in a determination dated 14 August 2013 allowed, on human rights grounds, the appellant's appeal

against a decision to refuse asylum made by the Secretary of State on 12 June 2013.

2. Although the Secretary of State is the appellant in the appeal before us we will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly although Mr Samuel Rupiya is the respondent before us we will refer to him as the appellant as he was the appellant in the First-tier Tribunal.

3. The appellant is a citizen of Zimbabwe born on 27 July 1961. He entered Britain as a visitor on 25 August 2001. On 22 February 2002 he applied for an extension of stay for medical treatment as he had been diagnosed as HIV positive. That application was refused on 20 February 2003.

4. The appellant applied for asylum on 17 March 2005. That application was refused but the appellant's appeal against the refusal was allowed by Immigration Judge Boyd on 27 January 2006.

5. An application for reconsideration was then made by the Secretary of State and although that was refused in the Tribunal a further application was made in the Administrative Court. The application in the Administrative Court was not determined for three years when it was remitted to the Upper Tribunal who heard the appeal on 1 September 2010. The Designated Immigration Judge who heard the appeal found that the original determination contained an error of law and set aside that decision. He went on to remake the decision and dismissed the appeal on asylum and human rights grounds in a determination dated 8 October 2010.

6. In January 2011 the appellant made a fresh claim for asylum. Although that claim was refused on 12 June 2013 the appellant was granted a further right of appeal. It was in these circumstances that the appellant's appeal came before Judge Wyman on 31 July 2013.

7. The judge considered all aspects of the appellant's claim. He made clear findings that the appellant was not entitled to asylum as he did not have a well-founded fear of persecution in Zimbabwe. He noted that Judge Boyd, who had allowed the appellant's appeal in 2005, had not found the appellant to be credible and had found that he did not have a well-founded fear of persecution for a Convention reason but had applied the then country guidance in **AA (Zimbabwe) CG [2006] UKAIT 00061** which had said that there was a risk for involuntary returnees. He pointed out that case law had changed significantly since that date and referred to the current country guidance case of **EM (Zimbabwe) CG [2011] UKUT 00098** and, having noted that there was significantly less politically motivated violence in Zimbabwe, found that the appellant would not face persecution for a Convention reason on return.

8. The judge noted that the appellant's representative stated that the appellant was not making a separate claim on the basis of his ill health under Article 3 but that he wished the factors relating to his ill health to be considered as part of his Article 8 claim. The judge, having stated that he believed that when the appellant had come to Britain he had been extremely ill, and had been able to obtain anti-retroviral therapy here and he needed to continue on medication for his HIV infection for the remainder of his life, considered the treatment available for those with HIV in Zimbabwe and concluded that he did not find there was any evidence that the appellant's health would be at risk if he were returned due to the non-availability of medication.

9. With regard to the appellant's links with Britain he noted that the appellant had married here and lived with his wife but that they both had children in Zimbabwe. In paragraphs 102 and 103 he noted that the appellant's wife's children who had been born in 2000 and 1997 were in Zimbabwe and that the appellant had a daughter there and a son in South Africa. He stated that they both had extended family living in Zimbabwe. He noted that neither the appellant nor his wife had family in Britain "save for wider extended family."

10. He noted that Mrs Rupiya worked part-time in Britain and that the appellant worked, unpaid as a pastor in the church. He said, however, that there was no documentary evidence of that and no bank statements or wage slips had been provided to confirm that he was in regular paid employment. He concluded that there was very little information about the appellant's links to the United Kingdom with various religious groups, clubs or undertaking voluntary work.

11. In paragraphs 111 onwards he stated that this was an unusual case because of the issue of delay. He noted that the appellant's application for asylum had been refused but allowed by Judge Boyd in January 2006 and the judge said it was not known why it took four years for the appellant's case to be returned to the Tribunal. In paragraph 113 he referred to the case of **EB Kosovo [2008] UKHL 41** and went on to say in paragraphs 114 onwards:-

> "114. In this case, it is not in dispute that the appellant won his asylum appeal in January 2006. However the case was taken back to the Upper Tribunal in September 2010 – over four years later. Clearly, the appellant developed various social ties in the United Kingdom during the extensive period, including to the person he later married.
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> 115. However what I find significant is that the delay can be shown to be the result of a dysfunctional system. The appellant was successful in his asylum appeal hearing back in January 2006. He therefore had every expectation that he would be granted leave to remain. The appellant did not go underground – but has been compliant with his reporting conditions throughout this period.

116. I believe it is unfair to the appellant that over four years later, his case is taken back before the Upper Tribunal and his asylum appeal then dismissed, especially at a time that he was not represented.

117. It is for this reason, and this reason alone, that I believe the appellant's claim should be allowed under Article 8 as the delay in this case, caused only by the respondent means that it is an unlawful interference with the right to respect for the appellant's private and family life now established in the United Kingdom."

12. The judge therefore allowed the appeal on human rights grounds.

13. The Secretary of State appealed, stating that the judge had failed to give any or adequate reasons for a finding on a material matter when considering the appellant's rights under Article 8 of the ECHR. It was argued that the judge had erred in not placing weight on the relevant sections of the Immigration Rules and therefore had not had regard to the Secretary of State's view as to where the balance between the individual's rights and public interest lay.

14. The second ground of appeal stated that the delays which had taken place in processing the case should not be determinative. The judge had failed to correctly identify the effects of the delay and had not followed the judgment in **EB Kosovo** in that regard. The grounds stated that while delay was a weighty factor in assessing proportionality it could not be a determinative one. They referred to the judge's findings that not much evidence had been provided of the appellant's private life here. The grounds pointed out that the appellant had ties in Zimbabwe and there were no insurmountable obstacles to his returning there to renew his private and family life.

15. Permission to appeal was granted by Judge of the First-tier Tribunal Davidge on 3 September 2013.

16. At the hearing of the appeal before us Mr Deller first stated that he wished to rely in particular on the second ground of appeal. He stated that the reality was that there had been no delay caused by the Secretary of State. What had happened between 2006 and 2009 had in fact been due process because of the changing country guidance at that time. The fact that the appellant knew that the decision of Judge Boyd had been challenged should have led him to realise that he should not have the expectation of being granted leave to remain. There had been no unfairness to the appellant. He had been able to remain in Britain to await the outcome of the challenge. He did not qualify for leave to remain and the conclusions of Judge Boyd were in error. Judge Wyman had therefore erred in his assessment of the appellant's rights under Article 8 of the ECHR.

17. Ms Masolo relied on a skeleton argument arguing that the judge had properly considered the Article 8 rights of the appellant and had reached conclusions that were open to him. She argued that the proportionality

assessment was balanced and focused on all aspects of the appellant's claim and that the judge had properly applied the ratio of the judgment of the House of Lords in **EB Kosovo**. She emphasised that the appellant could not have produced evidence of work as he had not been allowed to work here. She referred to the psychological impact on the appellant of removal and indeed the distress he had suffered because his situation had not been resolved between 2006 and 2010. She claimed that he had had a legitimate expectation of leave being granted. She referred to the family life which the appellant had established here.

18. We found that there was a material error of law in the determination of the Immigration Judge. It is of note that the judge makes it quite clear that the only reason that he was allowing the appeal on Article 8 grounds was that he felt that the appellant had been treated unfairly because of the delay in dealing with his appeal rights when he was initially refused asylum. He indicated that his conclusion was reached because he was following the judgment of the House of Lords in **EB Kosovo**.

19. That contention is simply wrong. It is not the case that the ratio of the judgment in **EB Kosovo** is that where there is delay that can be a determinative factor in assessing rights under Article 8 of the ECHR. What the judgment makes clear is that delay is one of a number of factors that can be taken into account but that the principle way in which delay can benefit an applicant is where, while the applicant remains in Britain, he has build up private and family life here to the point where it would not be reasonable for him to be removed. Delay is not a freestanding factor when assessing the proportionality of removal.

20. Moreover, the reality is that the delay which would militate against the decision of the Secretary of State to remove would have to be delay for which the Secretary of State was culpable. That is clearly not the case here. There was delay between the initial refusal of the appellant's application for leave to remain on medical grounds and his claim for asylum. That is delay for which the appellant was himself responsible as indeed was the delay between the decision of Designated Judge of the First-tier Tribunal Shaerf in October 2010 and the fresh claim in January 2011. The delay between the decision of Judge Boyd and that of Judge Shaerf was not the responsibility of the Secretary of State. Rather it was caused by due process while the application was effectively "stacked" with others in the Court of Appeal while consideration was given by that court to country guidance decisions. The delay that took place while the application by the Secretary of State was proceeding in the High Court was a delay which could have enabled the appellant to strengthen his private and family life in Britain but those factors were specifically given no weight by the judge when he weighed up the proportionality of the decision. It is quite clear that he based his decision simply on his belief that delay had taken place and that that delay was unfair to the appellant and that that, of its own entitled him to conclude that the decision was disproportionate. That conclusion of the judge was clearly wrong.

21. Having stated that we found that there were material errors of law in the determination and having given brief reasons for our conclusion we considered it appropriate to proceed with the hearing and after having given Ms Masolo time to take further instructions we heard evidence from the appellant. He relied on his statement and stated that he called Britain his home and that he had relatives, friends and a community here which meant that this was where his life was rather than in Zimbabwe. He stated that he had been tormented psychologically in the period between 2006 and 2010 because he had not heard anything and had been prescribed cocodomol from his doctor. He said that he had been affected financially because he had not been allowed to work. He had been concerned about his children.

22. We asked him what the immigration status of his wife was. He replied that she had been a student for some years and was waiting to hear. He stated that he did take drugs for his HIV and for his cholesterol.

23. Mr Deller submitted that the decision to remove was not disproportionate. No other issues other than the rights of the appellant under Article 8 were now live before us. He again emphasised that delay had been caused by proceedings in the Court of Appeal regarding country guidance. He emphasised that there was a public interest in maintaining appropriate immigration control and there was nothing particular or exceptional about the appellant's circumstances. He referred to the judgment of the House of Lords in **N (Uganda)** [2005] UKHL 81 and to relevant country guidance regarding the treatment of those with HIV in Zimbabwe.

24. In reply Ms Masolo stated that we should take into account the appellant's medical condition when considering his rights under Article 8 as well as the fact that the appellant had been here since 2001. He had been diagnosed with HIV shortly after his arrival. There was evidence in the bundle that there were shortages of drugs in Zimbabwe. She argued that particularly given the length of time the appellant had been here and the fact that he had set up family life with his wife here it would be disproportionate for him to be removed.

25. We have considered all relevant factors with regard to the appellant's rights under Article 8 of the ECHR. We note the comments of Judge Wyman that the only factor which should be taken into consideration when considering the proportionality of removal was delay. He clearly found, in paragraphs 102 through 110 where he set out his detailed findings, that the other relevant factors did not make the appellant's removal disproportionate. He was correct to point out that there was little evidence of the appellant's work here or indeed that of his wife. He was correct also to emphasise that both the appellant and his wife have children in Zimbabwe. He correctly applied the judgment in **RS and Others (Zimbabwe) CG [2010] UKUT** noting that it was found in that decision that returning individuals to Zimbabwe who were diagnosed with

HIV/AIDS was not a breach under the ECHR of the rights of those returned. He noted that significant numbers of people were receiving treatment for HIV/AIDS in Zimbabwe both under the public system and from non-governmental organisations and international organisations privately.

26. While it is relevant that the appellant has been here since 2001 the reality is that apart from a short period when he entered as a visitor the appellant has never had leave to remain. He has not, it appears, had paid work here and although he married here his wife, who is also Zimbabwean, has no leave to remain. As they both have family in Zimbabwe it is appropriate to expect them both to return there.
27. We can therefore only conclude that the removal of the appellant to Zimbabwe would be a proportionate interference with the private and family life which he has built up here and, having set aside the decision of the Judge of the First-tier allowing the appellant's appeal under Article 8 of the ECHR, we remake the decision and also dismiss the appeal on human rights grounds.

Decision

This appeal is dismissed on asylum, humanitarian protection and human rights grounds.

Signed Date

Upper Tribunal Judge McGeachy