Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00019/2013

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates Court	**Determination Promulgated**
On 17th October 2013	**On 23rd October 2013**
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Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR WEBSTER TAFADZWA KUTSAVA Appellant
(NO ANONYMITY ORDER)

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Radford (instructed by Braitch RB Solicitors)
For the Respondent: Mr J Parkinson (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant, a citizen of Zimbabwe, appeals, with permission, to the Upper Tribunal against a decision of the First-tier Tribunal (Judge Pooler and Mr Olszewski) promulgated on 2nd July 2013 by which it dismissed his appeal against the Secretary of State's decision to deport him to Zimbabwe.

2. There had been no application for anonymity in this case and I see no reason to order it.

3. The background to this appeal is that the Appellant, born on 14th January 1971 and now aged 42 came to the UK on 6th September 2002 with leave to enter as a student valid until 31st October 2003. He overstayed that leave and in August 2005 after being encountered and detained by UKBA claimed asylum. He was released on temporary

admission. In March 2006 he applied for leave to remain as a highly skilled migrant. That was refused in May 2006. His asylum application was refused on the grounds of non-compliance in May 2007. However, on 23rd December 2010 the Secretary of State granted him Indefinite Leave to Remain in the United Kingdom.

4. On 8th August 2011 the Appellant was convicted on his guilty plea of 21 offences relating to his "business" of selling counterfeit DVDs. He was sentenced to 20 months imprisonment. That sentence was then increased by 668 days on 18th October 2012 following a confiscation order hearing. The value of the counterfeit goods was said to be over £80,000 and twice that had they been genuine.

5. As a result of those convictions are Secretary of State made a decision on 20th December 2012 to deport him pursuant to section 32 (5) of the UK Borders Act 2007. It was the Appellant's appeal against that decision which was before the First-tier Tribunal.

6. Permission to appeal was initially refused by a Judge of the First-tier Tribunal but then granted by Upper Tribunal Judge Rintoul who found it arguable that the First-tier Tribunal had erred in its conclusion that it is proportionate to expect the Appellant's partner to relocate to Zimbabwe.

7. It is my task first to decide whether the First-tier Tribunal made an error of law and if so whether and to what extent its determination should be set aside.

8. The grounds seeking permission to appeal, all of which were relied upon by Miss Radford are four; firstly when considering risk on return the Tribunal failed to take into account the political profile of the Appellant's family; secondly, failing to make a finding as to whether the Appellant's sur place activities represented genuinely held political beliefs; thirdly, finding it reasonable for the Appellant's British partner to leave the UK and fourthly, failing to consider the impact of her departure from the UK on the Appellant 's son who is a vulnerable adult and for whom she is the primary carer.

9. In relation to the first ground Miss Radford referred to the Country Guidance cases that confirmed politically active family members are a risk factor and would lead to interrogation by the CIO at the airport. She pointed out that in its findings as to risk on return the Tribunal had concentrated on the Appellant's low level support but not factored in his family's situation. His two sisters came to the UK in 2002 and have been granted refugee status. His mother who came to the UK in 2007 has also been granted refugee status.

10. There is little evidence in the sisters' and mother's witness statements or oral evidence as to their political activities. Sheilla says that she is a committee member of Wolverhampton MDC. Both sisters refer to working for the MDC in Zimbabwe and being attacked by Zanu PF as a result of which they fled. Their evidence although considerably lacking in detail, was unchallenged by the Home Office Presenting

Officer before the First-tier Tribunal and as a result accepted by it. It is also the case that all three are refugees. I was not told of the basis of their claims.

11. The Tribunal noted that the Appellant also came to the UK in 2002 – with leave as a student. He did not claim asylum until apprehended by the authorities. He had not been of any interest to the Zimbabwe authorities between 1995 and 2001 and had not been politically active. The First-tier Tribunal was aware of his family members' refugee status (paragraph 33). The Tribunal referred to the risk factors set out in the Country Guidance cases (paragraph 34 and 35) and concluded this Appellant was not of sufficiently high profile to excite attention. That is the case notwithstanding his family's situation. They are not high profile either. The First-tier Tribunal did not err in its consideration of the risk factors appertaining to this Appellant. If they were high profile it would have been a risk factor; they are not. They do not claim to have come to the authorities' attention and thus it is unlikely the CIO will even know anything about them.

12. The second ground asserts that the First-tier Tribunal erred in failing to make a finding as to whether or not the Appellant's Sur Place activities resulted from genuine political motivation. If they did that would inform a finding as to his likely behaviour on return (the HJ (Iran) [2009] EWCA Civ 172 principle). At paragraph 30 the Tribunal notes the Home Office Presenting Officer's submission that he had taken part in the vigils solely for the purpose of bolstering his asylum application. The Tribunal correctly note that his motivation is irrelevant to assessing whether the behaviour puts him at risk. It is however relevant to assessing how he would behave on return. The Tribunal dealt with this at paragraph 39 where it says that it is not satisfied that he would, on past evidence, engage in political activities likely to attract the adverse attention of Zanu PF. That reference to "past evidence "necessarily includes Sur Place activities and the Tribunal's finding must necessarily be on the basis that he did not attend the vigils due to deeply held political views. If he is not going to indulge in such activities that is a good indication of his politics; namely he has none. He will not have to lie therefore if questioned about his political affiliation.

13. The next two grounds relate to the Article 8 claim and in particular the Tribunal's finding that the Appellant's partner could join him in Zimbabwe. It is argued that as a British citizen she cannot be expected to leave the UK and in that regard Miss Radford relied upon Sanade [2012] UKUT 00048 (IAC) for her submission that the Secretary of State cannot require a British spouse to leave the UK. That is overstating the findings in Sanade and Zambrano. In those cases there were children and expelling a non EU national necessarily meant the other family members had to leave also. That is not the case here. The Tribunal did not err in its findings in relation to the Appellant's partner. It provided a very detailed and thorough determination dealing with all of the issues in the case. It acknowledged that the Appellant had been in a relationship with his partner for a long time and that she had stood by him during his imprisonment and had continued to live with and support his two sons. She indicated that she was not prepared to join him in Zimbabwe as is her right. The Tribunal at paragraph 62 correctly noted that the public interest lies in deportation where an Appellant is a

foreign criminal. He did present as a low risk of reoffending and his offences did not involve violence, drugs or sexual offending. However, they were serious offences leading to a very substantial term of imprisonment and as the Tribunal noted the sentencing judge referred to the offending as "a planned, premeditated, long-term fraud by an intelligent and well-informed man". An immediate and substantial custodial sentence was the result notwithstanding the Appellant's previous good character.

14. The Tribunal noted that the strongest aspect of the appeal was the Article 8 claim and in particular his relationship with his partner. It noted her stated intention not to move with him to Zimbabwe but nevertheless did not think it unreasonable for her to do so. That was a finding they were entitled to make. This is not a case which stands or falls on whether or not the couple are separated. A permanent separation would not outweigh the public interest in deportation and thus whether or not his partner would go with him is irrelevant to the outcome. The First-tier Tribunal was entitled to find that it is a matter for the Appellant's partner whether the separation is permanent. She has a choice. She can remain in the UK exercising her right as a British citizen to do so or she can join her partner in Zimbabwe. She is not expected or required to leave the UK; there is a decision for her to make. This is a deportation case not a removal case where the inability of a spouse to travel with the Appellant may be determinative. Accordingly, even if the First-tier Tribunal made an error in finding it reasonable for the partner to leave the UK, it is immaterial because permanent disruption to the family life enjoyed by the Appellant and his partner would not be sufficient to outweigh the public interest in deportation.

15. Miss Radford also argued that in finding that the Appellant's partner could move to Zimbabwe with the Appellant they failed to take into account the effect on the Appellant's son who has mental health problems. The Tribunal took full account of his situation. It noted that he had mental health problems. However, it also noted at paragraphs 51 and 52 that both sons are adult South African citizens neither of whom have any leave to remain in the UK. It noted that the Appellant's partner had found it difficult, both financially and emotionally to look after them and had expressed a view that it was time they moved on. Clearly she is reaching a point in time when she is no longer prepared to undertake the care of the Appellant's sons. That is entirely understandable as they are not her responsibility and they have family in the UK. The Tribunal noted that at paragraph 52. Furthermore, the son who has mental health problems receives support from the Terrence Higgins trust and has a Care Coordinator. His difficulties have not prevented the Appellant's partner from working full-time. The Tribunal therefore cannot be said to have failed to take into account the his situation. Again however, even if they had the evidence does not support a finding that either the Appellant's or his partner's care is required by him.

16. The First-tier Tribunal's determination is a carefully crafted decision taking into account all of the evidence with detailed findings in relation to the Appellant's asylum claim which for sustainable reasons it found not made out. There is a thorough assessment of the Appellant's Article 8 claim. At the end of the day this Appellant

committed a very serious offence for which he received a total prison sentence of almost four years notwithstanding that it was his first offence. It was a calculated, materialistic offence committed by an intelligent man. Clearly very compelling reasons indeed would be required to outweigh the public interest in his deportation and they are quite simply absent from this case. The Appellant's partner was in a relationship with him throughout the time of his offending and it is unlikely that she was ignorant of it albeit she was not involved in it. The Appellant's sons have no status in the UK. In short, this Appellant's appeal against deportation is without any merit.

17. There is no error of law in the First-tier Tribunal's determination and the appeal to the Upper Tribunal is dismissed.

Signed Dated 22nd October 2013

C J Martin
Judge of the Upper Tribunal