Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP000142016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 July 2017	**On 21 July 2017**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SN
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr C Jaquiss, Counsel, instructed by Dicksons Solicitors

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal McIntosh, who in a determination promulgated on 24 April 2017 allowed the appeal of SN against a decision dated 11 February 2016, of the Secretary of State to deport him under the provisions of Section 32(5) of the UK Borders Act 2007.

2. The appellant is a citizen of Zimbabwe who was born in May 1977. He arrived in Britain on 29 January 2002 at the age of 24 and claimed asylum. He was interviewed and granted refugee status on 18 March 2002.

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Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly I will refer to SN as the appellant as he was the appellant in the First-tier.

3. On 31 March 2014 he was convicted at Northampton Crown Court of "not being an authorised person in relation to regulated activity". On 9 April 2014 he was sentenced to four and a half years' imprisonment. He was served on 11 June 2014 with a notification of intention to deport and notification of the provisions of Section 72 of the Nationality, Immigration and Asylum Act 2002. He was invited to rebut the presumption that the offences for which he had been convicted and sentenced were particularly serious and he posed a danger to the community and to the United Kingdom. In April 2015 the Secretary of State wrote to the appellant to notify him of the intention to cease his refugee status and he was given an opportunity to submit representations with regard to his continuing entitlement to such status. Those representations were made during 2015 but on 1 October that year his refugee status was revoked.

4. The judge heard evidence from the appellant with regard to his claim to asylum. She noted that he had received threats of violence in Zimbabwe from ZANU-PF as he had joined the MDC and was a member of that party. Adverse attention had also been brought on him because of what he had said in an address at his brother's funeral. He had stated that he was also at risk because of his father's role with the ZIPRA, which had been targeted by those who had supported ZANU-PF.

5. The appellant's evidence regarding his private and family life was that he had met his wife, Mrs SLN in 2006. They have three children, all born in Britain the eldest was born on 4 April 2005, the second child was born on 25 January 2008 and the third on 12 July 2012. The children, as is the appellant's wife, are British, his wife who was born in Zimbabwe entered Britain in 1993 at the age of 15 and is naturalised.

6. The judge considered in some considerable detail the appellant's crime taking into account the sentencing remarks of His Honour Judge Mayo as well as the OASys assessment which had been completed on 25 May 2016. She noted that that report had been based solely on the account given by the appellant to the writer. She noted the appellant's case that he is rehabilitated and had tried to use his time in prison to gain skills which could be used in the community and moreover that he had maintained constant contact with his wife and children.

7. The judge also heard evidence from the appellant's wife regarding the difficulties which she had suffered after the appellant had been sentenced and the effect that that had had on the children. It was her evidence that she would not be able to return to Zimbabwe with the appellant and that it was her preference to remain in Britain and for the children to remain in the environment and culture in which they were born. She stated that the

appellant’s presence in the life of the children was essential, particularly for a young black male today.

8. Having heard submissions from both representatives the judge set out her findings in paragraphs 38 onwards. She placed particular weight on the sentencing remarks of Judge Mayo. She noted that the appellant had been arrested in 2011 but had not been sentenced until 2014. She noted that the judge, although he had found the appellant lacking in credibility, accepted that he had not deliberately targeted vulnerable investors apart from one person and stated that it was the case that between 43 and 66% of the initial investments made to the appellant had been paid back – the appellant had operated what appeared to have been a Ponzi scheme. She stated that although a large number of people had lost substantial savings “it is also right that the appellant made no significant personal gain to himself or his family”. She stated that he had learnt skills while in custody and also noted that the OASys assessor had rated his likelihood of reoffending as being low overall and low in relation to non-violent and violent type offences. She said that in taking into account the appellant’s rehabilitation she had also taken into account his conduct in custody in the OASys assessment. She stated the evidence before her was supportive evidence that the appellant presented a low risk of reoffending.

9. The judge then quoted from the judgment of the Court of Appeal in **MA (Pakistan) [2014] EWCA Civ 163** at paragraph 19. She placed weight also on the fact that the OASys assessment might not be relevant because the author of the report was reliant upon information provided by the appellant but said that, however, before the index offence he had been a man of good character and his conduct in prison had been exemplary. She said that her conclusion was that he did not pose a danger to the community and did not pose a risk of reoffending.

10. The judge then turned to consider the provisions of Section 72 of the Nationality, Immigration and Asylum Act 2002. She noted the definition of serious criminal and stated that with regards to the facts which she had considered – the appellant’s conduct, the terms of the OASys statement, his qualifications while in prison and indeed certain of the comments made by the judge that she considered that the appellant had rebutted the presumption in Section 72.

11. Turning to the issue of the appellant’s claim to asylum the judge stated that his account was consistent and credible and that having considered the country guidance in his bundle and referred to the report of potential risk to returnees who had no connection with ZANU-PF who were returning after considerable absence she considered that he might face serious ill-treatment. She noted that although country guidance indicated that in certain areas returnees from the United Kingdom might not face significant difficulty from ZANU-PF even if they were an MDC supporter she on balance found that given the appellant’s family’s association with the MDC and particularly the role which the appellant’s father played in

relation to ZIPRA there would be a real risk of harm to him on return. With regard to the appellant's private and family life she referred to the three children and the length of time the appellant had been in Britain and stated that it was in the best interests of the children of the family to remain in the care of both parents and that it would be unduly harsh to require the children of the family to relocate to Zimbabwe where their father would face a real risk of harm.

12. The judge referred to Section 117(c) of the 2002 Act and noted that the appellant had been lawfully resident in Britain since 2002 and that his eldest child was now in primary school and his son had enrolled into nursery and the family were fully integrated. She stated that there would be significant obstacles to the appellant establishing his life safely in Zimbabwe.

13. She stated in paragraph 54 that:

> "I give consideration to Section 117(c) of the 2002 Act as an additional consideration to Article 8. I find that the Exception over and above that which is referred to in Section 117(c) is established in the appellant's case. I note that the appellant is in a genuine and subsisting relationship with a qualifying partner and a genuine and subsisting parental relationship with qualifying children",

She stated that she considered that the effect of deportation on the partner and children would be unduly harsh. She then turned to the provisions of Section 398(b) or (c) and set out the provisions therein as well as those of paragraph 399A.

14. The judge then referred to the difficulties which the appellant's wife had had and explained that it was necessary for her to move to her sister's wife to enable her to work and allow her sister to take care of the children. She referred to the difficulties the appellant's son had had in reaching developmental milestones. She stated that in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009 it was in the best interests of the children for the family to remain in the care of both parents, the appellant and his partner.

15. She then went on to allow the appeal on asylum grounds and on humanitarian protection grounds. In paragraph 60 she stated that: "In view of the above conclusions, I find that the Exception applies to the circumstances of the appellant's wife and children and the decision to deport the appellant and I therefore allow the appeal."

16. The Secretary of State's grounds of appeal argued stated that there were errors of law in that the judge had found that the appellant was credible, that she had not said what country guidance she had followed. It was argued and arguing that it could not have been **CM (Zimbabwe)**, which she had followed. Moreover, the grounds went on to state that the judge

had allowed the appeal solely on asylum and humanitarian protection grounds and that it would appear that the judge had allowed the appeal on "another basis but has failed to state if this was in accordance with the Rules or outside the Rules" and that, it was argued, was an error of law.

17. The judge had gone on to allow the appeal as it was in the best interests of the children but then had failed to give any reasons for the finding although it was always in any event a primary consideration but not a sole paramount consideration to be balanced against other factors.

18. With regard to further compelling factors the grounds referred to the decision in **Hesham Ali [2016] UKSC 60** quoting therefrom in which it was said that the reference to exceptional circumstances served the purpose of emphasising that in the balancing exercise great weight should be given to the public interest in deporting foreign criminals who could not satisfy Rules 398 and 399 or 399A. It was only exceptionally that such foreign criminals would succeed in showing that their rights under Article 8 trumped the public interest in their deportation.

19. The grounds quoted further from paragraphs 37 and 38 of **Hesham Ali** stating that cases not covered by the Rules in 399 and 399A should have been dealt with dealt with on the basis that great weight should generally be given to the public interest in the deportation of offenders but that could be outweighed, applying a proportionality test, by very compelling circumstances, which would be in reality a very strong claim indeed.

20. At the hearing before me Mr Tarlow relied on the grounds of appeal. . Mr Tarlow stated that it was an error of law of the judge not to identify country guidance on which she relied and had not given adequate reasons for her conclusions. Moreover, she had not dealt with the issue of whether or not there were compelling factors in this case, pointing out that the appellant had received a sentence of 51 months. Ms Jaquiss referred to the determination in **CM** and stated that given that the appellant came from Bulawayo internal relocation was not open to him. Moreover, she argued that it was quite clear that there was still politically motivated violence in Zimbabwe. The fact that the judge had not identified relevant country guidance would not necessarily be material. Ms Jaquiss stated that the fact that the judge had not referred to the determination in **CM** was not material. She clearly had in mind relevant country guidance before making the decision and had reached findings of fact which were open to her thereon. She stated that the appellant had shown that there would be a real risk on return and indeed said that the judge had summarised relevant country guidance. Moreover, the judge had reached findings and conclusions which were fully open to her.

21. With regard to the Article 8 issues she had placed weight on the three children and the compelling circumstances which would make the removal of the appellant disproportionate. The judge when considering

proportionality was entitled to take into account the situation in Zimbabwe.

Discussion

22. I have considered the record of proceedings before the judge and I consider that it must be accepted that the judge had must clearly have in mind that determination which was referred to by both representatives. Moreover, it is the case that the judge considered that there were particular circumstances which meant that the appellant would be targeted over and above being a member and supporter of the MDC. She was entitled to place weight on the appellant's father's involvement with ZIPRA. It must be borne in mind that the appellant's claim for asylum had initially been accepted by the Secretary of State, who must therefore have considered that when he claimed asylum he was vulnerable because of his political activities or beliefs. I consider that while the conclusion of the judge may be generous it was the case that the conclusion she made was open to her and she was entitled to find that the appellant would face ill-treatment on return to Zimbabwe.

23. Turning to the issue of the appellant's rights under the ECHR the reality is that the judge did set out and referred to both the Rules and Section 117C. I consider that she clearly applied the law as set out therein. It is trite law now that when considering the provisions of Section 117C the judge has to consider a proportionality exercise placing weight on the public interest in the deportation of foreign criminals as well as the rights of an appellant's partner and children. I consider that it is clearly obvious that for British children who have been born and brought up in Britain and have lived here all their lives and have reached the ages of 11, 9 and even 5 it would be unduly harsh to expect them to go to live in Zimbabwe where it must be accepted that conditions are extremely harsh. Similarly the appellant's wife has lived here since the age of 15. In effect, she appears to have spent around half her life and indeed all her adult life in this country. It would in these circumstances I consider be unduly harsh to expect her to leave Britain and return to Zimbabwe. While the judge does not state in terms, however, is that given that the appellant has been sentenced to a period of imprisonment of over four years there need to be very compelling circumstances to show that these Article 8 considerations would outweigh the public interest in removing the appellant. However, that is clearly the conclusion that she reached.

24. I bear in mind that the judge also found that the appellant would face ill-treatment on return to Zimbabwe. I consider that that factor together with the obviously unduly harsh circumstances for the appellant's wife and children to be expected to return to Zimbabwe would be considered to amount to very compelling circumstances and therefore I consider that the

judge did not make a material error of law by not actually using that particular term.

25. I note that the judge did not state in terms that she allowed the appeal on human rights grounds. I consider that clearly that is what the judge intended to do. In any event, I consider that when the judge referred to humanitarian grounds she was actually referring to an infringement of the appellant's rights under Article 8 of the ECHR. Even if that were not the case she states in terms that she allowed the appeal and she could only have done so on the basis that she found the grounds, which referred to the appellant's rights under the ECHR were made out.

26. I therefore conclude that the conclusions of the judge were open to her and that there is no material error of law therein and I consider that her decision to allow this appeal on asylum grounds and, by implication, on human rights grounds shall stand.

Notice of Decision

The appeal is of the Secretary of State is dismissed and the decision of the First-tier Judge to allow the appeal shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 20 July 2017

Upper Tribunal Judge McGeachy