Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07183/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 20 August 2019	**On 9 October 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MALVERN MUNASHE CHIBUKWA
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Ms H Aboni, Senior Home Office Presenting Officer
For the Respondent: Ms E Norman, Counsel instructed by Tann Law Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter "the claimant", against the decision of the respondent to refuse him leave to remain on human rights grounds. The claimant is subject to a deportation order signed on 6 June 2017 and made as a consequence of his being sent to twenty months detention at a Young Offender Institute on 15 July 2016 for two counts of possession of class A drugs (cocaine and heroin) with intent to supply on 15 July 2016.

2. The claimant asserted a right to remain on human rights grounds after receipt of the deportation order. Submissions were made on 22 June 2017 and these led to the refusal of leave on human rights grounds on 2 March 2018.

3. The Secretary of State set out the claimant's immigration history. He is a citizen of Zimbabwe and he was born in May 1996. He entered the United Kingdom as a dependant of his mother with entry clearance to expire in February 2005. He was given leave to remain in line with his mother's until 13 December 2013. In January 2015 he made a late application for further leave which was refused in February 2015. He remained in the United Kingdom without permission.

4. On 18 February 2016 he was arrested for possession of prescribed drugs with intent to supply and on 14 February 2017 he was sentenced to twenty months' detention for two counts of possession with intent to supply class A drugs. The deportation order was signed on 6 June 2017 and he was released from custody on 1 December 2017.

5. The Secretary of State directed herself to the relevant Immigration Rules. She said the deportation was conducive to the public good and in the public interest because of the sentence that had been imposed. The Secretary of State recognised that the rules created exceptions to the usual consequences of being convicted of a serious offence and a possible exception was at paragraph 399A of the Immigration Rules. That applied where a foreign criminal had been lawfully resident in the United Kingdom for most of his life and was socially and culturally integrated into the United Kingdom and there would be very significant obstacles to the foreign criminal's integration into the country where he would be sent. The Secretary of State did not accept that the claimant had lived lawfully in the United Kingdom for most of his life. He had certainly lived in the United Kingdom since he was aged 8 but there were gaps in his leave and he had certainly no right to remain since December 2013.

6. Neither did the Secretary of State accept that the appellant was socially and culturally integrated. There had been evidence of childhood involvement at a church in Birmingham but there was no evidence that he had been employed or taken part in any voluntary work or that he was financially independent or that he had made any contribution to the wider community but he had committed criminal offences. Similarly the Secretary of State did not accept that there were very significant obstacles to the claimant's integration into life in Zimbabwe. Although he had no adult experience of life there his parents were Zimbabwean and it was said that he could familiarise himself with the country. The Secretary of State did not accept there were very compelling circumstances preventing deportation because there was a strong public interest in his deportation following his conviction of supplying unlawful drugs.

7. The First-tier Tribunal's approach was less than satisfactory.

8. The judge accepted evidence that the claimant spoke English and Shona. She also accepted evidence that the claimant had begun a relationship with his girlfriend which might be described as a serious relationship but they were not living together. The girlfriend was not a partner under the Rules.

9. The judge set out to apply the Rules. Paragraph 339(a) does not assist the claimant because he did not have a parental relationship. Paragraph 339(b) did not apply because he did not have a partner under the rules.

10. Further, the judge did not accept that there would be very significant obstacles to the claimant's integration into life in Zimbabwe. This was based on the possibility of parental support from the United Kingdom and his ability to speak Shona.

11. However the judge found at paragraph 20 of her Decision and Reasons that the appellant *had* been lawfully resident in the United Kingdom for most of his life and that he was socially and culturally integrated in the United Kingdom.

12. She then looked at the appellant's offending. She was satisfied on the evidence, particularly the judge's sentencing remarks, that the appellant was not the instigator in the matters that led to his imprisonment. He had played a lesser part in the offence than had his co-accused and the claimant was of previous good character. The judge went on to allow the appeal.

13. The judge said at paragraph 30 of her decision:

> "The [claimant], has for the most part been in the UK lawfully. Of a period of twelve years three years has been precarious and partly unlawful. Whilst the rest has been unlawful. He came to the UK as a dependant of his mother whilst still in his formative years. He has spent the majority of his life in the UK and that I find is a factor that reduces the public interest in immigration control."

14. She then purported to have conducted a balancing exercise and decided to allow the appeal.

15. I cannot understand paragraph 30.

16. The claimant was born on 13 May 1996. He arrived in the United Kingdom on 3 February 2005 apparently with leave as the dependant of his mother. He was then 7 years and almost 9 months old. His leave expired on 13 December 2013. It follows that he has had permission to be in the United Kingdom for 8 years, 10 months and some days. He was 17 years 7 months and some days old when his leave expired so he had then been in the United Kingdom for just over half of his life. By the time that he made his application for leave on human rights grounds he had clearly not been in the United Kingdom lawfully for most of his life and the proportion was less by the time the judge heard the appeal.

17. I wondered if the judge meant to say that the claimant had been in the United Kingdom for the most part *un*lawfully but that would not explain paragraph 20.

18. Be that as it may the Secretary of State particularly criticised the assertion that the fact that he had spent the majority of his life in the UK "is a factor that reduces the public interest of immigration control".

19. It is not clear what the judge meant by reducing the "public interest of immigration control".

20. The grounds point out, correctly, that it is wrong to assert that the fact of long residence reduces the public interest. There is no justification whatsoever for that although I suspect rather than there being the glaring error that it seems it is a rather careless way of saying that the length of residence is a factor which might be thought to be balanced against the public interest in removal. The difficulty is that only applies under the Rules when the residence has been mostly lawful and here it was not.

21. I agree that the judge erred by making much of the claimant's lesser involvement in the criminal offences that brought him before the Crown Court. The overwhelmingly most important criterion for assessing the seriousness of the offence is the sentence. That is essential because there are two qualifying conditions under the rules and under part 5A of the Nationality, Immigration and Asylum Act 2002 that direct the approach to human rights appeals involving people who are subject to deportation. Essentially the sentence of twelve months' duration qualifies a person for automatic deportation but certain exceptions apply and a sentence of four years or more restricts further the exceptions that apply. It will be going too far to say that other matters are never of any relevance because an article 8 balancing exercise is necessarily widely drawn but it is not helpful for judges to indulge in an examination of the minutiae of the offending. The Crown Court can be expected to have given proper regard to the mitigating factors and even if, extraordinarily, it did not, the Tribunal is in no position to correct any error. In appeals involving deportation once the qualifying sentences have been imposed the reasons for them will not normally be of much interest and are probably best avoided because consideration can give the impression of error.

22. I agree too that the judge has given too much regard to the prospects of rehabilitation. Deportation is not about rehabilitation, even in the case of people convicted when they are minors (there may be exceptions for EEA nationals). The judge has clearly given some weight to that.

23. The judge found that the claimant could not benefit from Section 117B of the Nationality, Immigration and Asylum Act 2002. That is clearly right because there is no partner or child to consider.

24. The Secretary of State said that the judge had effectively paid lip service to the phrase “very compelling circumstances” and “has erroneously diluted the public interest”.

25. I have to say I have difficulty in understanding why the judge has allowed the appeal on the findings that have been made. Clearly she felt sorry for him. The claimant has lived in the United Kingdom for a long time and it is not his fault that he was brought as a child. Although he has committed the offences indicated he has not committed other offences. Although he has some distant links with Zimbabwe it is in most ways a foreign country to him. It is a difficult country where life is challenging and it is reasonable to assume he will not find it easy to adapt to living there.

26. Ms Norman made points on the claimant’s behalf. I agree with her that it is not the claimant’s fault that he did not have leave for much of his time in the United Kingdom. Some of the gap was caused by his mother’s inefficiency in making a late application. That does not really diminish the fact that he was in the United Kingdom having entered with permission and was making his home there. That is something that can be balanced in the scales for the appellant’s advantage. The trouble is that there is little else that can be said on this appellant’s behalf. The strongest point is the time that he spent in the United Kingdom and statute law, which seems to have been largely ignored by the First-tier Tribunal Judge, says how this should be treated. Section 117C of the 2002 Act asserts that the deportation of foreign criminals is in the public interest but two exceptions apply. Exception 2 has no relevance here. The appellant’s friend is not a qualifying partner but even if she were there is a finding by the First-tier Tribunal Judge that she could live in Zimbabwe. Exception 1 applies when three contingencies occur. One is that the claimant is socially, culturally integrated in the United Kingdom. The judge has made that finding in his favour. Second a cumulative requirement is that the claimant has been lawfully resident in the United Kingdom for most of his life. He has not. A third cumulative requirement is that “there will be very significant obstacles” to his integration into the country where he would be deported. The judge found that there were no very significant obstacles to the claimant reintegrating into life in Zimbabwe (paragraph 22).

27. It is quite clear that the judge’s findings can only support a decision that the claimant cannot take advantage of the Exceptions created by Parliament.

28. I have to conclude that the judge’s decision to allow the appeal was are wrong. There reasoning is obscure and there are materially wrong directions.

29. I further conclude that the only proper decision on the findings of fact is to substitute a decision dismissing the appeal.

30. I have reflected before taking this course. I have, of course, realised that from the claimant’s point of view it is very unattractive for him to have

had this hanging over his head now for some years, to think he won because his appeal was allowed in the First-tier Tribunal and now to be told that he must prepare himself to be deported. I recognise too that there is some evidence of better relations in the community and certainly no evidence of further trouble. It may be that he has learnt his lesson and will not attract the attention of the criminal courts again. The first experience of custody does sometimes have that effect. It is by no means an unbelievable claim. None of this helps him.

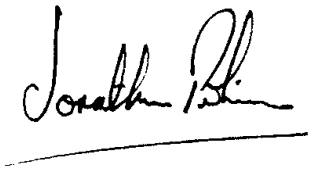
31. There is nothing here that permits a decision to allow the appeal under the Rules or outside the Rules. There are no exceptional circumstances and the statutory tests are not met.

32. It follows therefore that I allow the Secretary of State's appeal. I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the decision of the Secretary of State.

Notice of Decision

I allow the Secretary of State's appeal.

I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision to refuse him leave to remain on human rights grounds.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 8 October 2019