



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/00135/2010

**THE IMMIGRATION ACTS**

**Heard at Birmingham**

**On 25<sup>th</sup> June 2013**

**Determination**

**Promulgated**

**On 22<sup>nd</sup> July 2013**

**Before**

**UPPER TRIBUNAL JUDGE RENTON**

**Between**

**ALWIN MUTYAMBIZI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Unrepresented

For the Respondent: Mr J Singh, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction**

1. The Appellant is a male citizen of Zimbabwe born on 15<sup>th</sup> January 1982. He has a lengthy immigration history. The Appellant first arrived in the UK on 25<sup>th</sup> September 2001 when he was given leave to enter as a visitor for

a period of two months. He was subsequently given leave to remain as a student until 31<sup>st</sup> August 2004. He applied for further leave to remain in that capacity but that application was refused on 8<sup>th</sup> October 2004. The Appellant's appeal against that decision was dismissed on 15<sup>th</sup> March 2006. However the Appellant did not leave the UK and remained illegally.

2. On 27<sup>th</sup> July 2007 the Appellant was sentenced to sixteen months' imprisonment for an offence of robbery. As a consequence on 24<sup>th</sup> October 2007 a decision was made to make a deportation order against him. The Appellant's appeal against that decision was dismissed on 16<sup>th</sup> January 2008, and on 12<sup>th</sup> November 2008 the deportation order was made.
3. Thereafter various representations were made on behalf of the Appellant. Eventually and in June 2009 the Appellant applied for asylum. That application was refused on 22<sup>nd</sup> October 2009 and at the same time a decision was made to refuse to revoke the deportation order. There was then confusion as to whether the Appellant had ever been served with the deportation order and as a consequence the deportation order was re-served upon the Appellant on 12<sup>th</sup> November 2008 at which time the Respondent made a fresh decision to refuse to revoke the deportation order. The Appellant appealed.
4. The Appellant's appeal was heard by a Panel chaired by First-tier Tribunal Judge Sommerville (the Panel) sitting at Birmingham on 29<sup>th</sup> January 2010. The Panel decided to dismiss the appeal for the reasons set out in its Determination dated 22<sup>nd</sup> February 2010. The Appellant sought leave to appeal that decision and on 15<sup>th</sup> March 2010 such permission was granted. The appeal first came before me on 4<sup>th</sup> August 2011. According to a Minute I subsequently wrote I found that the Panel had erred on a point of law. The Panel had failed to apply properly the decision in **RN (returnees) Zimbabwe CG [2008] UKAIT 00083** when considering the risk on return; and had failed to give sufficient reasons for not believing significant parts of the Appellant's evidence. I set aside the decision of the Panel, and then adjourned the appeal for the decision to be remade. That is the matter which comes before me today.

### **The Law**

5. The Appellant brings his appeal under the provisions of paragraph 390 of the Statement of Changes in Immigration Rules HC 395 which reads as follows:

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;

- (iii) the interests of the community, including the maintenance of an effective immigration control;
- (iv) the interests of the applicant, including any compassionate circumstances.

The Appellant appeals on the grounds set out in Section 84(1)(c) Nationality, Immigration and Asylum Act 2002 that the decision is unlawful under Section 6 Human Rights Act 1998 as being incompatible with his Convention rights. The Appellant cannot pursue an appeal on the basis that he qualifies for asylum because the Appellant is subject to a certificate issued under the provisions of Section 72 of the Nationality, Immigration and Asylum Act 2002 and therefore is excluded from protection under Article 33(2) of the Refugee Convention. That certificate is still in force. However I will next consider if the Appellant is entitled to Articles 2 and 3 ECHR protection.

### **Articles 2 and 3 ECHR**

6. The Appellant has made a series of statements concerning his reasons for fearing a return to Zimbabwe. He was also interviewed by an Immigration Officer in June 2009, and gave oral evidence at the hearing before the Panel. He again gave oral evidence before me and that evidence is recorded in the Record of Proceedings.
7. The Appellant's case is that he used to live with his family in Mhondoro, a part of Harare. The Appellant's sister died in 1994, and following the later deaths of his parents, the Appellant had gone to live with his brother Alfred in Glen Nora, a suburb of Harare. Alfred and the Appellant's cousin Julius had been members of the MDC. Because of his age, the Appellant had not been much politically active, although he had attended MDC rallies with Alfred and his other brother Albert who had come to the UK in 1998. However in August 2000 the Appellant and Alfred had been arrested along with others on suspicion of being MDC supporters and using their house for MDC meetings. They were detained and beaten up over a period of two days when they were questioned about their MDC activities. The Appellant suffered severe bruising and still has scars. The Appellant then went to live in hiding in Chitungwiza for a year during which time he obtained a passport. He then joined his brother Albert in the UK. His brother Alfred remained in Harare and continued with his MDC activities. In his community Alfred was accused of being a traitor by ZANU-PF members as most of his family had gone to live in the UK. Alfred was arrested regularly in Zimbabwe because of his support for the MDC but was always released after a short detention. On one occasion in 2004 Alfred was severely beaten in detention and as a consequence died in 2005. Following this event the Appellant realised that it was not safe for him to return to Zimbabwe, although on one occasion the Appellant applied to return to Zimbabwe on a Voluntary Return Scheme. The Appellant has not been politically active in anyway whilst in the UK, but

wants regime change in Zimbabwe. He is not aware of the authorities looking for him in Zimbabwe.

8. Throughout these proceedings there have been issues as to the Appellant's credibility, but even taking the Appellant's case at its highest, I am not satisfied that the Appellant qualifies for Articles 2 and 3 protection. I come to that conclusion by applying the matrix of facts of the Appellant's case to the relevant country guidance cases.
9. It was decided in **HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094** that failed asylum seekers do not, as such, face a risk of being subjected, on return to Zimbabwe, to persecution or serious ill-treatment whether the return is voluntary or not. Otherwise the risk on return is specified in **CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC)** where it was decided, inter alia:
  - (1) As a general matter there is significantly less politically motivated violence in Zimbabwe, compared with the situation considered by the AIT in **RN (returnees) Zimbabwe CG [2008] UKAIT 00083**. In particular, the evidence does not show that, as a general matter, the return of a failed asylum seeker from the United Kingdom, having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to the ZANU-PF.
  - (2) The position is, however, likely to be otherwise in the case of a person without ZANU-PF connections, returning from the United Kingdom after a significant absence to a rural area of Zimbabwe, other than Matabeleland North or Matabeleland South. Such a person may well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU-PF authority figures and those they control. The adverse attention may well involve a requirement to demonstrate loyalty to ZANU-PF, with the prospect of serious harm in the event of failure. Persons who have shown themselves not to be favourably disposed to ZANU-PF are entitled to international protection, whether or not they could and would do whatever might be necessary to demonstrate such loyalty (**RT (Zimbabwe)**).
  - (3) The situation is not uniform across the relevant rural areas and there may be reasons why a particular individual, although at first sight appearing to fall within the category described in the preceding paragraph, in reality does not do so. For example, the evidence might disclose that, in the home village, ZANU-PF power structures or other means of coercion are weak or absent.
  - (4) In general, a returnee from the United Kingdom to rural Matabeleland North or Matabeleland South is highly unlikely to face significant difficulty from ZANU-PF elements, including the security forces, even if the returnee is a MDC member or supporter. A person may,

however, be able to show that his or her village or area is one that, unusually, is under the sway of a ZANU-PF chief, or the like.

- (5) A returnee to Harare will in general face no significant difficulties, if going to a low-density or medium-density area. Whilst the socio-economic situation in high-density areas is more challenging, in general a person without ZANU-PF connections will not face significant problems there (including a “loyalty test”), unless he or she has a significant MDC profile, which might cause him or her to feature on a list of those targeted for harassment, or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF, or would be reasonably likely to engage in such activities, but for a fear of thereby coming to the adverse attention of ZANU-PF.
  - (6) A returnee to Bulawayo will in general not suffer the adverse attention of ZANU-PF, including the security forces, even if he or she has a significant MDC profile.
10. I find that the Appellant does not have a significant MDC profile. His activities for the MDC in Zimbabwe amounted to very little and were carried out at a time when he had just left school. He was arrested and detained on one occasion, but that was as long ago as August 2000, and the Appellant has been absent from Zimbabwe since September 2001. He has not been politically active in the UK. His connection with the organisation known as Communities Point does not amount to political activities because as explained in the statement of the Appellant’s cousin, Julius Mutyambizi, Communities Point is not a political party and is not connected to the MDC. Members of the Appellant’s family such as his brother Alfred and his cousin Julius have been more active in the MDC, but Alfred died in 2005, and the Appellant has never lived in the same household as Julius. I am not therefore satisfied that these connections give the Appellant a significant MDC profile. The Appellant’s own evidence was that he was not aware of the authorities in Zimbabwe having any interest in him.
  11. The Appellant has no ZANU-PF connections, and indeed is in favour of the overthrow of that regime, and will be returning to Zimbabwe after a significant absence. However, the Appellant will not return to a rural area. He will return to Harare where his home in Zimbabwe always was. There is no evidence as to what density area the Appellant might return to, but as already mentioned, the Appellant does not have a significant MDC profile, and there is no evidence that he features on a list of those targeted for harassment. He has not expressed a wish to engage in any political activities on return to Zimbabwe.
  12. In any event, I find it will be safe for the Appellant to relocate to Bulawayo. The Appellant has never had any connection with that city, but otherwise there was no evidence that it would be unreasonable by way of being unduly harsh to expect him to live there.

13. For these reasons I find that the Appellant is not entitled to Articles 2 and 3 ECHR protection.

### **Article 8**

14. It is no part of the Appellant's case that paragraphs 399 and 399A of HC 395 apply to him and I so find.
15. I will now consider the Appellant's Article 8 ECHR rights. To do so, I will follow the format given by the questions of the late Lord Bingham in **R (Razgar) v SSHD [2004] UKHL 27.**
16. The relevant evidence is as follows. The Appellant now has no close family in Zimbabwe. His extended family in the UK amount to an aunt and uncle and cousins including Julius.
17. When the Appellant first came to the UK he lived with his brother Albert who subsequently married Rachel Gorogondo and had two children namely Nyaradzo born in October 2001 and Simba born in September 2006. According to the Appellant he lived with Albert and his family for his first three years in the UK, although according to the evidence of Rachel Gorogondo given to the Panel he lived with them for only a short period in 2001. Whatever is the truth, at about the time the Appellant was sent to prison Albert and his family moved to live in Edinburgh. It was there that Albert committed suicide in the summer of 2009. The Appellant visited Albert's widow in April 2009 and June 2009 when he assisted with the funeral arrangements. The Appellant claims that since then he has telephoned Rachel Gorogondo every day and has visited her every few months in order to provide support for her and her children. However there is no recent evidence from Rachel Gorogondo to this effect.
18. The Appellant also has a son names Mathew Heffen born on 18<sup>th</sup> August 2004. The mother of that child is named Victoria Heffen. The paternity of Mathew is disputed by the Respondent, but for the purposes of this consideration I will take it that the Appellant is the natural father of Mathew. The evidence is that Mathew has never lived in the same household as the Appellant. Indeed, there was no contact between them at all until April 2009. The Appellant states that he now has a normal father/son relationship with Mathew and to begin with had contact with him once every two weeks. However it is apparent from what the Appellant said at the hearing that his relationship with Victoria Heffen is difficult and as a consequence at times the Appellant does not see his son at all. For example, in his statement of January 2013 the Appellant indicated that he had not seen Mathew since August 2012. There was no evidence in support of the appeal from Victoria Heffen at the hearing before me because, apparently, she was on holiday in Wales.
19. The Appellant has a partner named Elizabeth Paul. She is a British citizen who has lived all of her life in the UK. She is employed, and has two adult children who also live in the UK. The relationship between the Appellant

and Elizabeth Paul started some time in 2009. They have cohabited since April 2011 apart from a period between August and December 2011 when the relationship broke down and the Appellant had a relationship with a woman known as Shami. If the Appellant was removed from the UK, Elizabeth Paul would not go to live with him in Zimbabwe.

20. The Appellant committed the offence of robbery in March 2007. It amounted to a mugging of a woman in order to steal her handbag. The Appellant committed the offence in order to fund a gambling habit. The Appellant was released from his prison sentence on 15<sup>th</sup> January 2009. He committed a further offence of theft in December 2011 for which he was sentenced to 50 hours' community service.
21. From this evidence I deduce that the Appellant has a family life with his son Mathew and also with Elisabeth Paul. There is conflicting evidence as to the extent of the Appellant's relationship with Mathew. Referring to Elizabeth Paul's statement of 13<sup>th</sup> June 2013, and in particular paragraph 5 thereof, it would seem that the contact between the Appellant and Mathew has been extensive at times, but the Appellant's indication at the hearing before me was that he was again not enjoying good relations with Mathew's mother and that contact had almost come to an end. However, the Appellant can rely upon the presumption contained in the decision in **Berrehab v the Netherlands [1989] 11 EHRR 322** that family life exists between a biological parent and child. The Appellant and Elisabeth Paul have not entered into the commitment of marriage but that is not necessary for family life to exist between them. Apart from one aberration, they have a longstanding and caring relationship.
22. It must also be the case that the Appellant has a private life in the UK having lived here since September 2001. There was no evidence of the detail of that family life, but during that time the Appellant has studied, worked, and been engaged with organisations such as Communities Point.
23. I am satisfied that the Appellant's departure from the UK would result in an interference with that family and private life to such a degree of gravity as to engage his Article 8 rights. At least in the case of Elisabeth Paul, it will be the effective end of that relationship. As was decided in **VW (Uganda) v SSHD [2009] EWCA Civ 5** the test to establish such interference does not have a high threshold. Indeed little more than a technical or inconsequential interference is needed.
24. I will now consider proportionality, balancing the public interest against the Appellant's circumstances, bearing in mind that the best interests of the child, Mathew are a primary consideration, although not the primary consideration and not a paramount consideration.
25. The deportation order which the Appellant seeks to revoke was made as a consequence of his offence of robbery. Referring to the sentencing remarks of His Honour Judge Spencer, the background to the offence was that the Appellant had gambled away his wages and was without funds

and desperate for money. The offence was committed in order to replace the money which the Appellant had gambled away. The victim of the offence, which happened in the dark, was a lone woman returning home from a shopping expedition. The Appellant snatched her handbag from her as she was opening the security gate to her home. The Appellant was chased by a member of the public and apprehended. The Judge rejected submissions made on behalf of the Appellant that the offence was unplanned and opportunistic. The offence was serious because of the consequences for the victim who had been frightened and upset to say the least. The offence merited an immediate custodial sentence.

26. At the hearing before the Panel there was evidence in the form of reports that the Appellant was of a low risk of reoffending. That evidence is now irrelevant because the Appellant has reoffended. Subsequent to that later offence, there has been no further evidence put before me as to the likelihood of the Appellant committing further offences. I find that I must deal with him on the basis that he is a person who has a propensity to commit criminal offences.
27. I find that I have to attach considerable weight to the public interest because of the Appellant's criminal behaviour despite the fact that the main offence was committed by the Appellant now over six years ago and the Respondent took no immediate action to remove the Appellant following the making of the deportation order.
28. Such weight is necessary as a consequence of the basic principles set out in the decision in **Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 00046 (IAC)**.
29. On the other side of the balance, I will first consider the best interests of the Appellant's son Mathew. He is now nearly 9 years of age and lives with his mother. Mathew had no contact with the Appellant until April 2009, and contact since then has been fragmented and irregular. I cannot agree with the Appellant's assessment that he has a normal father/son relationship with Mathew. Although it may be assumed that it would be in the best interests of a child to have some relationship with his biological father, there is no evidence before me that Mathew's best interests would be damaged by the end of personal contact with the Appellant. The limited contact which has occurred so far can be continued to some extent by modern methods of communication.
30. I accept that the Appellant's removal would amount to the effective end of his relationship with Elizabeth Paul. Her circumstances are such that it would be unreasonable to expect her to follow the Appellant to Zimbabwe. I have commented about the nature of this relationship when deciding that the Appellant and Elizabeth Paul have a family life. On that basis I am not satisfied that the consequences of the effective end of the relationship outweighs the public interest.



31. As regards the Appellant's private life, this includes the Appellant's relationship with Albert's widow and her two children. According to the Appellant, they speak regularly by telephone, but such an arrangement could continue if the Appellant was removed to Zimbabwe. Otherwise the Appellant visits Rachel Gorogondo and her children occasionally. Although if deported the Appellant would not be able to visit them again, it is not out of the question for her and the children to visit the Appellant in Zimbabwe. Otherwise, there is no evidence before me that the other aspects of the Appellant's private life in the UK could not be continued in Zimbabwe.
32. Otherwise, the Appellant is a healthy young man of 31 years of age. He has lived in the UK for nearly twelve years, and it is the case that he now has no family, home, or employment in Zimbabwe. However, there was no evidence before me that he could not successfully readjust to life in that country.
33. Taking all these factors into account, I find that the public interest carries most weight and therefore that the Respondent's decision not to revoke the deportation order is proportionate.

#### **Paragraph 390 of HC 395**

34. All of the factors required to be considered by this paragraph have been dealt with above. My decision is that the deportation order made against the Appellant should not be revoked. The Appellant comes within the provisions of paragraph 398(b) of HC 395, but not paragraphs 399 nor 399A by virtue of the provisions of paragraph 399(a)(ii)(b) and 399(b)(i). Therefore by virtue of paragraph 390A it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors. As I have already explained, I find no such exceptional circumstances.

#### **Decision**

35. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. It has been set aside.
36. I remake the decision in the appeal by dismissing it.

#### **Anonymity**

37. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. There has been no application that I should make such an order and I find no reason to do so.

Signed

Date 22<sup>nd</sup> July 2013

Upper Tribunal Judge Renton