Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01396/2013

THE IMMIGRATION ACTS

Heard at Nottingham	**Determination Promulgated**
on 29th January 2014	**on 5th February 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

M E L N
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Muzira of The First Law Partnership.
For the Respondent: Mr Richard – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel for the First-tier Tribunal composed of First-tier Tribunal Judge Colyer and Mrs R M Bray (non legal member), hereinafter referred to as 'the Panel', who in a determination promulgated on the 16th October 2013 dismissed the appeal against the decision to deport the Appellant from the UK made by virtue of Section 3(5)(a) of the Immigration Act 1971.

2. The determination was challenged on four grounds, a failure to take into account the Appellants ill health as requiring family support as exceptional personal circumstances weighing against deportation, a failure to adequately assess Article 8 ECHR – right to private and family life, an inadequate assessment of the risk on return, and the making of factual errors in the determination leading to a lack of confidence in the Tribunals assessment of the appeal.

3. In granting permission to appeal, on the 4th November 2013, First-tier Tribunal Judge Gibb stated in paragraph 5 of the grant:

"Overall, despite the length of the determination, it is arguably not clear that the panel addressed the central issues, particularly the nature of the offending, immigration status, the best interest of the children, rehabilitation and treatment prospects, all ill health in relation to family support, rather than as a freestanding Article 3 claim."

4. Judge Gibb concluded by stating that all grounds are arguable indicating that the grounds on which permission had been granted are those pleaded on which Ms Muzira was asked to make submissions.

5. A summary of the findings made by the Panel is as follows:

i. The Appellant was born in 1974 in Zimbabwe. He has used a number of aliases in the UK [42].

ii. The Appellant arrived in the UK from Zimbabwe on 11th January 1999 as a visitor. His leave was extended until 31st December 1999.

iii. The Appellant was referred to the immigration authorities following his arrest on 10th February 2002 for his fourteenth motoring offence when he was served with form IA151A as an overstayer [44].

iv. His claim for asylum, made when arrested, was refused on 28th June 2002. His appeal against the refusal was dismissed but permission to challenge the first judge's decision granted [44]. Following a further hearing on 29th March 2004 the Appellant was found not to be credible and the appeal was dismissed on all grounds [46, 47].

v. The Appellant was granted ILR to remain outside the rules on 2nd April 2009 [49].

vi. The Appellant was first convicted on 18th April 2000 and has thirteen convictions for twenty eight offences [50].

vi. When granted ILR outside the Rules, on 2nd April 2009, the Appellant was warned about the consequences of his future conduct including acts of criminality [51].

vii. On 18th March 2011 the Appellant was convicted of a breach of a non-molestation order. His sentence was consecutive to an earlier sentence imposed by the same court as a result of the commission of further offences during the operational period of a suspended sentence imposed on 16th March 2011 [52].

viii. The Appellant was also convicted of two offences of driving with excess alcohol on 6th May 2013, southbound on the M1, and on 8th May 2013, northbound, for which he was given a term of imprisonment of 18 weeks.

ix. The Appellant was convicted of breaching a non-molestation order on five separate occasions between February and March 2011 [54].

x. A restraining order was made against the Appellant for the period 16th March 2011 to 15th March 2013. The Panel note an entry in the record of a named Magistrates Court dated 8th May 2013 (in relation to the excess alcohol offence) which states: "Offence so serious, because custody justified – danger to yourself and others, have nine previous offences, second committed only days after the first and whilst on police bail. Were high readings and evidence of bad driving." [55].

xi. The Respondent was correct to make a presumption in favour of the deportation of the Appellant. The reasons set out in the explanatory letter are endorsed [56].

xii. The Appellant remains a risk of further offending [58].

6. In relation to the risk on return to Zimbabwe the Panel set out their findings at paragraphs 59 to 63 which can be summarised as follows:

i. The Appellant has no MDC profile at all which would bring him to the notice of the authorities in Zimbabwe on return [60].

ii. The Appellant is from Harare and can return there. He will not be required to demonstrate a ZANU-PF profile. There is no evidence he will be required to relocate to an area where loyalty to ZANU-PF might be expected [61].

iii. The Appellant has no prior political profile. He has not engaged in political activities. He holds no professional position

such as a teacher which will bring him to the adverse attention of the authorities in Zimbabwe [62]. The Appellant was not involved with the MDC as he left Zimbabwe before that party was formed. Previous Tribunals have found his account to be lacking in consistency or credibility [63].

7. In relation to the credibility of the Appellant:

i. The Appellant only made his asylum and human rights claim after becoming subject to the deportation decision [65]. His failure to have claimed on arrival or shortly thereafter casts doubt upon the credibility of the claim. His actions are more indicative of a person who came to the UK for economic ends rather than as a result of a need for international protection [68].

ii. The Appellant was not found to be a credible witness and the Panel had doubts about his truthfulness of many details of his account [66].

iii. The Appellant is lacking in credibility and has failed to establish that he will be targeted on return [69].

iv. The claims under Articles 2 and 3 are based upon the same facts as his asylum/humanitarian protection claim. The Appellant failed to prove he will suffer a breach of a protected right. The refusal to grant humanitarian protection is correct for the reasons given by the Respondent [71].

8. In relation to the Appellants family life:

i. The Appellant's daughter is nearly 18 (born October 1995). There was no credible evidence of recent contact between them [74].

ii. There is no credible evidence the Appellant or his daughter adhered to an order dated 1st December 2003 made by the Luton Country Court for staying contact on every 4th weekend [75].

iii. The Appellant was unable to provide details of his daughter, such as her full address [76]. The Appellant has limited family life with his daughter and the relationship is not so well established that it would be disproportionate to deport him [80].

iv. There is no evidence of ongoing family life between the Appellant and his previous wife from whom he is now divorced [81].

v. The Appellant has failed to establish that the relationship he has with SS, who he married in 2003 and with whom he has a son KN aged 9, has lasted. Family life with SS has not been proved [82-84].

vi. In relation to KN, an application for contact heard by the Nottingham Country Court resulted in an order for fortnightly contact with a condition preventing the Appellant from consuming alcohol. A final order was made on 19th May 2011 but the application subsequently dismissed [86]. The Appellant did not provide the correct address of KN [87] and the child was not brought to visit him whilst he was in prison [88]. The Respondent has considered the best interests of the child which is to remain in the UK with his mother. The relationship between the Appellant and KN is not so well established that it would make it disproportionate to deport him [89].

v. The claim to be married to another woman, JN, was noted but it found the Appellant had failed to prove he has any genuine or subsisting family life with this person [90]

vi. A claim to share an address with VM was rejected as she is the beneficiary of the non-molestation and restraining order the Appellant was convicted of breaching [91].

vii. The Appellant has stayed at times with his sister but the relationship is not one of significant dependency [92].

viii. The Appellant's family life has been restricted by his imprisonment. Any family life he has established is not so exceptional or dependant that the family member needs him to remain in the UK [96] and, after an analysis of case law and the Bouliff/Uner criteria, at paragraphs 102.

9. In relation to the Appellant's medical conditions this was argued by reference to Article 3 in the skeleton argument, and before the Panel, but it found the high threshold of Article 3 was not breached and that no separate issues arose under Article 8 (2) [103-109].

10. The Panel found the Appellant is able to work and support himself, that it would not be unduly harsh to return him to his country of origin, and that although it would not be easy for him to re-establish life in Zimbabwe, it had not been shown he was entitled to remain on this basis. A claim of destitution was rejected [110-111].

11. In relation to the proportionality of the decision and interests of the community; it was found the decision was proportionate and in the interests of the community [126-132] and that the Appellant is liable to be deported [133-134].

Discussion

12. As stated at the outset of the hearing I accept the Panel made a number of errors in the determination but whether they are material was a matter upon which submissions were invited.

13. This is a conducive deportation and not an automatic one. Section 3(5) of the 1971 Act gives the Secretary of State power to deport a non British Citizen (a) if he deems it to be conducive to the public good (b) if another member of the family is to be deported and (c) if a court recommends it after conviction of an offence punishable by imprisonment. (Section 3(5)(a) is reflected in paragraph 363 of the Immigration Rules, which states that a person is liable to deportation where the Secretary of State deems that person's deportation to be conducive to the public good.)

14. In Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196(IAC) the Tribunal said that in a deportation appeal not falling within section 32 of the UK Borders Act 2007, the sequence of decision making set out in EO (deportation appeals: scope and process) Turkey [2007] UKAIT 62 (see below) still applies but the first step is expanded as follows: (i) Consider whether the person is liable to be deported on the grounds set out by the Secretary of State. This will normally involve the judge examining:- (a) Whether the material facts alleged by the Secretary of State are accepted and if not whether they are made out to the civil standard flexibly applied; (b) Whether on the facts established viewed as a whole the conduct character or associations reach such a level of seriousness as to justify a decision to deport; (c) In considering b) the judge will take account of any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with that policy; (d) If the person is liable to deportation, then the next question to consider is whether a human rights or protection claim precludes deportation. In cases of private or family life, this will require an assessment of the proportionality of the measures against the family or private life in question, and a weighing of all relevant factors; (e) If the two previous steps are decided against the appellant, then the question whether the discretion to deport has been exercised in accordance with the Immigration Rules applicable is the third step in the process. The present wording of the Rules assumes that a person who is liable to deportation and whose deportation would not be contrary to the law and in breach of human rights should normally be deported, absent exceptional circumstances, to be assessed in the light of all relevant information placed before the Tribunal.

15. The conclusions by the Panel in relation to the liability to be deported, although appearing at the end of the determination, are lawfully correct and are not challenged in the grounds seeking permission to appeal. No legal error is established.

16. The second stage required the Panel to consider whether a human rights or protection claim precludes deportation which in relation to the private and/or family life claim required an assessment of the proportionality of the measures against the family or private life in question, and a weighing of all relevant factors. It is clear from a reading of the determination that this exercise was conducted by the Panel and the challenge to the decision is based upon the way in which they undertook this exercise.

17. Ground 1 alleges a failure to consider the Appellants health issues and the need for family support as an exceptional personal circumstance weighing against deportation.

18. I find no arguable merit in the claim the Panel failed to consider all the relevant medical evidence. Ms Muzira's submission to this effect has not been made out. A reading of the determination demonstrates that the Panel were aware of the Appellants medical condition as an examination of the papers before the Panel clearly shows. The medical report dated 12th September 2013 has had relevant paragraphs of the same marked by a Panel member and is referred to in the determination [A's appeal bundle pages 7-8]. There is no formal requirement for the Panel to give reasons for their findings on each and every issue provided a reader of the determination can understand the basis of the conclusions reached. I find the Panel considered the material they were asked to consider with the degree of care required in an appeal of this nature and gave reasons for their findings. As such the weight to be given to the material was a matter for the Panel.

19. The claim the Appellant's circumstances are exceptional, such as to make deportation disproportionate as he had no family support, has no merit. The 12th September 2013 letter, written by a Cardiologist with the Gateshead NHS Trust, refers to the Appellants alcohol issues and his heart defect and states that provided he abstains from alcohol and remains compliant with medication he might experience a reasonable recovery. It is recommended he sees a specialist two to three times a year but it was not proved to the Panel, nor before me, that suitable medical treatment is not available and accessible in Zimbabwe. The medical evidence fails to support the claim that the lack of family support means he cannot be deported, especially in light of the factual findings made regarding the limited extent of his family life in the UK. No legal error is proved in relation to the proportionality assessment on this basis and nor is it shown that exceptional circumstances exist. The Panel recognised that re-adjusting will be difficult but did not find it proved that it will make the decision disproportionate. This ground is a mere disagreement with the weight given by the Panel to the evidence and the outcome of their consideration of that evidence. No legal error material to the decision is proved.

20. It is also relevant to note in relation to the claim the Appellant needs family, as they will have a positive impact upon him, that their presence in the UK prevented neither his drinking nor his offending in the past. This is relevant to the proportionality of the decision too.

21. Ground 2 alleges a failure to adequately consider Article 8 ECHR and the right to private and family life. It is alleged the finding in relation to his daughter are flawed as they failed to consider the evidence of the child's mother that the Appellant enjoyed contact prior to his being imprisoned. The relationship between the Appellant and his daughter LN was considered at paragraphs 73 to 80 of the determination, where it was found there is no credible evidence of recent contact which is supported by the material referred to in the grounds; as there is no evidence of contact since the Appellant was imprisoned. This is factually correct. I note that in paragraph 19 of the determination a reference to a submission made by Mr Azmi at the hearing that such contact had not occurred as LN's mother had decided that it was not appropriate. I have already found the Panel considered all the evidence they were asked to consider and the relationship between the Appellant and his daughter was considered with the degree of care required. The key finding that the family life they have is limited and does not make the decision disproportionate is within the range of findings the Panel were entitled to make on the evidence. No legal error is proved.

22. The challenge to the finding in relation to the Appellants son, based upon an allegation the Panel failed to appreciate that if deported it was highly unlikely they will see each other again, was clearly a factor known to the Panel as evidenced by paragraph 94 of the determination in which they find:

> 94. To echo what was said by Sedley LJ in AD Lee v SSHD [2011] EWCA Civ 348 and the effect of deportation in this case will be most likely to break up this family because of the effects of the appellant's bad behavior. This is what deportation does. The appellant did not have the best interests of his family at heart when he embarked on committing these very serious offences. The appellant has, by his own serious criminal actions has become physically separated from his family and friends.

23. Even if family become separated and relationships lost or unable to develop, this is only one element of the balancing exercise. It has not been shown before either the Panel or the Upper Tribunal that any effect of such separation is sufficient to make this a determinative factor or one that should have been given greater weight by the Panel.

24. Ground 3 challenges the assessment of risk on return. The Appellant claimed in his evidence to be at risk as he will be unable to demonstrate loyalty to Zanu-PF but the Panel found he had not established he will be required to do so. It is not a time of elections in Zimbabwe and the Appellant was not found to be a credible witness, which is an unchallenged finding. The Panel applied the relevant case law, CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059(IAC) and, in relation to risk at the airport, HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094. The findings made are within the range of permissible findings on the evidence and no legal error is proved. Mere disagreement with those findings does not establish legal error. The case law does not establish a risk per se for someone who has been out of the country for 14 years.

25. I do not find it proved the Panel failed to consider these elements of the claim appropriately or that they failed to understand the evidence or the country conditions. No legal error material to the decision to dismiss the appeal on protection or human rights grounds has been made out.

26. As the Appellant was unable to succeed under the above it was necessary for the Panel to go on to consider the Immigration Rules. The Rules relating to deportation are to be found in paragraphs 398, 399 and 399A.

27. In MF (Nigeria) [2013] EWCA Civ 1192 the Master of the Rolls indicated that where the "new rules" (in force from 9 July 2012) apply (in a deportation case), the "first step that has to be undertaken is to decide whether deportation would be contrary to an individual's article 8 rights on the grounds that (i) the case falls within para 398 (b) or (c) and (ii) one or more of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies. If the case falls within para 398 (b) or (c) and one or more of those conditions applies, then the new rules implicitly provide that deportation would be contrary to article 8" (paragraph 35, underlining added). Paragraphs 399 and 399A can be thought of as setting out the exceptions to deportation (see paragraph 14).

28. The order in which the Panel considered the issues is not as per the guidance provided in Bah but no material legal error is proved. There is an overlap in relation to Ground 1 which is drafted by specific reference to 398 and the fact that if an individual is unable to succeed under 399 or 399A it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors. I have commented upon the claim that this test is met by the lack of family members in Zimbabwe above, which is reinforced when considering that the term exceptional circumstances. "Exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a

deportation would not be proportionate" – see Kabia (MF: para 298 - "exceptional circumstances") 2013 UKUT 00569 (IAC). Such a test has not been shown to be met on the evidence.

29. I find it has not been shown the Appellant is able to succeed under the Immigration Rules.

30. Ground 4 refers to procedural issues and to errors of fact in the determination. I indicated at the outset that I accept there are such errors as reference to Jamaica and Nigeria is factually incorrect. I do not find they are indicative of a lack of understanding as a reading of the determination demonstrates the Panel was clearly aware of the correct country of nationality and return and of the fact the Appellant entered the UK on 11th January 1999 [43]. These errors arise as a result of a 'cut and paste' style for standard paragraphs and a lack of care in proof reading the determination, but no more. No procedural issues material to the decision are made out.

31. The Appellant has been shown to be a habitual offender. The Panel carefully considered the competing interests and the case he relied upon and it has not been shown the decision, in relation to those parts of the determination that are challenged, is tainted by legal error, such that the determination must be set aside and re-made.

Decision

32. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

33. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) to protect the identity of the minor child.

Signed.....
Upper Tribunal Judge Hanson

Dated the 30th January 2013