



IAC-AH-SC-V1

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

Appeal Number: PA/00100/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 15 February 2016**

**Decision &
Promulgated
On 4 April 2016**

Reasons

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

[T K]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe, born on [] 1983. He arrived in the UK on 24 November 2001 with entry clearance as a visitor. His leave was further extended, as a student, until 31 January 2004. Thereafter, he became an overstayer.

2. By reason of his conviction on 20 July 2006 for an offence of conspiracy to defraud, and his sentence of four and a half years' imprisonment, a decision was made on 30 April 2015 to make a deportation order against him under the automatic deportation provisions of the UK Borders Act 2007 ("the 2007 Act").
3. The appellant appealed against that decision to the First-tier Tribunal ("FtT") where his appeal was heard by First-tier Tribunal Judge Nicholls ("the FtJ"). In a decision promulgated on 9 November 2015 the appeal was dismissed on all grounds.
4. Permission to appeal having been granted by a Judge of the Upper Tribunal, the appeal came before me. The background to the appellant's claim is best illustrated with reference to the decision of the FtT.

The decision of the First-tier Tribunal

5. The appeal before the FtT raised asylum and human rights grounds, including in terms of the appellant's Article 8 rights.
6. Judge Nicholls considered the certificate issued pursuant to Section 72(9) (b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). At [46] he concluded that the appellant had not rebutted the statutory presumption that he had been convicted of a particularly serious crime and constituted a danger to the community of the United Kingdom (s.72(2)).
7. With reference to the appellant's claim that he would be at risk of Article 3 ill-treatment from those associated with one Frank Buyanga, he concluded that there was no evidence to show how such individuals might know of the appellant's return to Zimbabwe, and nothing to show that any association between Mr Buyanga and Zimbabwean government ministers could adversely affect the appellant.
8. In terms of family and private life, it was noted by the FtJ that the respondent had accepted that the appellant has a genuine and subsisting parental relationship with his two children in the UK. He also found that the appellant has a genuine relationship with [CW], that they have one child together and that there were "powerful, practical reasons" why they do not live together. Whether that was to be described as a family life or recognised as a significant part of their respective private lives he considered not to be important. He found that the relationship was formed, in reality, since the appellant was released from detention.
9. The FtJ also accepted [CW]'s evidence that she would not go to live with the appellant in Zimbabwe. He concluded that the appellant's deportation would therefore, interfere with the private lives of the appellant and [CW], even if their relationship may not amount to family life.
10. In relation to the best interests of the two children, the judge stated that he had no independent evidence about the appellant's 10 year old son and

his relationship with the appellant, and nor was there any professional assessment of the potential impact on that child of the appellant's deportation. The child lives with his natural mother, the primary carer. The judge concluded that the appellant's deportation would not affect that relationship (with the child's mother). He further concluded that the evidence did not show that the appellant's deportation would be adverse to the best interests of his son, T.

11. As regards the appellant's 3 year old daughter, whilst not doubting the evidence that the appellant is actively and closely involved in her care, the evidence did not suggest that she has any unusual or particular needs that can only be fulfilled by the appellant. He concluded that the appellant's involvement in his daughter's upbringing is clearly more substantial than that with his son, although his daughter's age inevitably means that she will be much more focused on her domestic life with her mother. He concluded that the evidence did not show that it would be adverse to the best interests of the appellant's daughter for the appellant to be deported.
12. As regards the appellant's parents, his conclusion was that there were insufficient factors to show the very compelling circumstances necessary to outweigh the substantial public interest in the appellant's deportation, bearing in mind his sentence. Likewise, in relation to the appellant's sisters.
13. In terms of the appellant's circumstances on return to Zimbabwe, the judge noted that it was accepted by the appellant's father that some form of financial support could be sent to the appellant from the UK, albeit that that was an arrangement which the appellant's mother rejected. His conclusion was that the difficulties in providing financial support, whether by his own efforts within Zimbabwe or by financial contributions from outside the country, did not amount to very compelling circumstances which would outweigh "the requirements of the deportation of foreign criminals from the UK".
14. As regards the evidence of family members to the effect that the appellant's character had changed and his maturity had increased, whilst not doubting the genuineness of those opinions, the judge concluded that they do not constitute "hard facts". He found that the inevitable increasing maturity of the appellant as he gets older and the improving prospects that he would not reoffend, with some support from the probation officer, do not amount to very compelling circumstances, either alone or in conjunction with the other more family orientated factors.
15. He concluded therefore, that there were not the very compelling circumstances over and above those described in paragraphs 399 and 399A of the Immigration Rules sufficient to outweigh the public interest in the appellant's deportation. Thus, the appeal was dismissed under the Immigration Rules and on human rights grounds.

The grounds of appeal and submissions

16. The grounds contend that the FtJ erred in his assessment of the risk of harm to the appellant from Mr Buyanga, described as a powerful individual in Zimbabwe who is a member of the Zimbabwe Central Intelligence Organisation (“CIO”) and closely connected with powerful figures involved in crime and politics there. Mr Buyanga had made threats against the appellant but the FtJ concluded that there was nothing to show that the appellant would suffer Article 3 ill-treatment on that account.
17. It is argued in the grounds that the FtJ failed to mention and to take into account the evidence that it was not simply the appellant’s fear of being directly harmed by Mr Buyanga and his associates, but that he also feared harm from ZANU-PF and the Zimbabwe regime because Mr Buyanga had spread the false allegation in Zimbabwe that the appellant was an active member of the MDC in the UK, and working against the Zimbabwean government’s interests here.
18. It is also contended that the FtJ erred in concluding that the appellant had not rebutted the presumption that he was a danger to the community, having regard to a letter from the Probation Service assessing him as a low risk of harm and that during the period of his licence there was nothing to suggest an increased risk from the appellant. The FtJ accepted that there was no record of the appellant having been convicted of any offence since 2006. The judge was wrong to conclude that notwithstanding there not being any record of any offence since 2006 there was the possibility that the appellant could have offended but not been detected in his true name. In any event, the possibility that the appellant could have offended is not a basis for concluding that he had not rebutted the presumption of being a danger to the community.
19. In submissions Mr Bandegani relied on the grounds of appeal. I was referred to the evidence in relation to the risk to the appellant from Mr Buyanga. It was submitted that that was a central part of the appellant’s case.
20. Although it was only the appellant’s evidence in relation to Mr Buyanga’s link to the Zimbabwe CIO, in that there is no independent evidence to support the claimed link, the judge did not engage with that evidence. It is not known what the judge thought of the appellant’s evidence as to what would happen to him on return to Zimbabwe.
21. I was referred to the decision in *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC) in terms of matters that the appellant was not convicted of. It was submitted that the FtJ had speculated as to the reasons why no further action was taken in relation to the 2009 arrest for theft. Given that the police held the appellant’s DNA and fingerprints, the use of aliases would not indicate that there were possibly further offences that had not been detected. It was not rational to conclude that he had offended but not been charged.

22. Mr Bandegani confirmed that there was no challenge to the judge's Article 8 conclusions.
23. Mr Walker submitted that even if the judge had impermissibly speculated about the appellant having committed other offences, that is not a material error of law, having regard to the fact that he was arrested on suspicion of theft on 24 April 2009 and given that he was wanted for failing to surrender to custody and a sentence of four years' imprisonment was outstanding. The FtJ was entitled to conclude at [42] that it was not surprising that the South Yorkshire Police should have decided not to pursue an offence of theft from a shop.
24. So far as risk on return is concerned, I was referred to [39] - [44] of the FtJ's decision in terms of the appellant's involvement in the conspiracy to defraud offence. At [40] the judge concluded that there was no confirmation of any connection between Mr Buyanga and the offence of conspiracy to defraud in respect of which the appellant was convicted. The judge also found at [43] that although the name of Frank Buyanga appears in news articles, all of those articles indicate that he operated an illegal loan business, not that he was raising funds on a fraudulently charitable basis. At [39] the judge had referred to the fact that the appellant "now" maintains that he was simply a minor player in the conspiracy, acting in the mistaken belief that he was assisting Mr Buyanga to raise funds for child poverty relief in Africa.
25. The sentencing remarks had shown that the appellant was the central person in the conspiracy. There was nothing to show a link between the appellant and Mr Buyanga. It was accepted that it would have been better therefore, for the FtJ to have expressly stated that there was no risk to the appellant in relation to any alleged rumours spread by Mr Buyanga and his apparent connections to the CIO, but there is nevertheless no error of law in the judge's decision.
26. In reply, Mr Bandegani referred again to the appellant's evidence, and the appellant's account as set out in the FtJ's decision. His explanation for not having given information to the police about Mr Buyanga was that he was threatened by him. In addition, at [21] it is recorded that the appellant had told his mother of threats being made against him and that she said that he told her he was not going to tell the police because their lives were in danger. After that, the appellant suddenly disappeared.

My assessment

27. The FtJ referred at [10] and onwards to the appellant's account of his involvement with Mr Buyanga and the threats that are said to have been made to the appellant about the consequences of his giving information about Mr Buyanga's involvement in the conspiracy. He said that he was persuaded by Mr Buyanga not to attend court. At [11] it is recorded that the appellant decided he would hand himself in to the police and tell them about Mr Buyanga. When he did hand himself in, the police said that they

would investigate him and that he was on their “wanted” list but had fled the country. The judge also noted the appellant’s claim that he was not a ringleader of the fraud offences of which he was convicted, but a “minor player” and that he had been wrongly portrayed during the criminal trial.

28. At [9] the appellant’s account is also referred to in terms of the claim that his involvement in the fraud offences was “minimal” and that he was very shocked when the police accused him of being a ringleader in a major fraud case which the appellant said had been undertaken by Mr Buyanga and another man called Canaan Moyo. That paragraph describes in summary how the appellant became involved with Mr Buyanga and what was said by Mr Buyanga to be a way of raising money to help poor children in Africa through the use of bank accounts to deposit money. The appellant’s account was that he naively agreed to help as he thought this was being organised through the church in which Mr Buyanga was an upstanding member.
29. At [12] there is reference to the appellant’s claim that he believed Mr Buyanga to be a member of the CIO who had been planted in the UK by ZANU-PF to keep an eye on political dissidents and to further the financial and political influence of ZANU-PF.
30. It is the case that the FtJ did not refer to the appellant’s claim that false rumours had been spread about him in terms of involvement with the MDC in the UK, such that on return to Zimbabwe the appellant would be at risk from the CIO, as much as from Mr Buyanga and his associates.
31. However, it is apparent from the judge’s decision that he rejected any contention that Mr Buyanga was involved in the conspiracy for which the appellant was convicted. Thus, at [39] he stated that the appellant “now maintains that he was simply a minor player in this conspiracy”, acting in the mistaken belief that he was assisting Frank Buyanga to raise funds for child poverty relief in Africa. However, at [40], after referring to a document from Hertfordshire Constabulary which stated that a Tawanda Buyanga was wanted for failing to attend court on charges of conspiracy to defraud, he stated that there was nothing on the face of the document as to when the events occurred or the nature of the conspiracy. He went on to state that there was no individual confirmation from Hertfordshire Constabulary that the appellant had provided information to assist them in their enquiries “or that there is any connection between Buyanga and the offence of conspiracy to defraud in respect of which the Appellant was convicted”.
32. In addition, at [43] the judge noted that although the name Frank Buyanga appears in news articles, all of those articles indicate that he operated an illegal loan business, not that he was raising funds on a fraudulently charitable basis. He referred to the trial judge’s assessment of the seriousness of the appellant’s actions which the FtJ correctly concluded was to be the starting point for his consideration of the s.72 certificate. In the same paragraph he noted that the appellant had made a late

application to the Court of Appeal for permission to appeal against his conviction and/or sentence, but that no further details had been given. Lastly, at [44] he expressed his conclusion that the appellant had not shown that his involvement in the conspiracy to defraud was substantially less central than that recorded by the trial judge.

33. In summary, as Mr Walker submitted, on the judge's findings there was nothing to show any link between the appellant and Mr Buyanga. I also agree that it would have been preferable for the judge to have dealt specifically with the issue of alleged rumours spread by Mr Buyanga about the appellant's involvement in anti-government activities in the UK, but given that the judge concluded that there was a lack of any connection between the appellant and Mr Buyanga, I am not satisfied that there is any error of law in this respect in the judge's decision. That is so, notwithstanding Mr Bandegani's contention that the appellant's own evidence before the FtT sought to explain why he had not implicated Mr Buyanga in the fraud, i.e. because of threats. Likewise in relation to the evidence from the appellant's mother in that respect. The judge was plainly aware of this evidence, having set it out at [10] and [21] but he gave sustainable reasons for his conclusions in relation to the appellant's involvement in the conspiracy, the lack of involvement of Mr Buyanga in that offence, and thus the lack of connection to the appellant.
34. I am similarly not satisfied that there is any error of law in the judge's assessment that the appellant had not rebutted the presumption that he represented a danger to the community, with reference to the s.72 certificate. I have already referred to what the FtJ said about the appellant's involvement in the offence of conspiracy to defraud, for which he received a sentence of four years and six months' imprisonment. The FtJ's consideration of the certificate starts at [37] and takes into account the offence for which the appellant was convicted. He referred to the judge's sentencing remarks, which included that the appellant was the central person in the conspiracy, the "brains behind it", and the person with the ability to exploit young people. He was convicted in his absence by the jury. As already indicated, the FtJ rejected the appellant's contention now that he was only a minor player in the conspiracy, contrary to the judge's sentencing remarks.
35. At [41] the FtJ referred to evidence from the Probation Service which confirmed that the appellant had completed his licence without any breach and that there was no police intelligence to show that there was any increase in risk from the appellant. He noted that the appellant was assessed as being at "low risk of harm". He did say however, that whether that was in relation to reoffending or of harm to the public is not made clear.
36. Also at [41] he referred to the documentary evidence showing that the appellant had been arrested on suspicion of theft from a shop on 24 April 2009 but that no further action was taken. The judge stated that he presumed that the appellant was not prosecuted. He noted however, that

the Crown Court records indicated that he was sentenced on 27 April 2009, some three days later, when he received his sentence of four years and six months' imprisonment, with an additional 30 days to run concurrently. At [42] he said that although it was clear that no further action was taken in relation to the allegation of theft, it is also clear that the appellant's claim to have handed himself into the police is at best overstated. He referred to the records indicating that the appellant came to notice when he was detained and as he was then wanted for failing to surrender to custody and a sentence of more than four years' imprisonment was outstanding, he concluded that it was not in the least surprising that the South Yorkshire Police should have decided not to pursue an offence of theft from a shop.

37. Again, at [44] the judge accepted that there is no record of the appellant having been convicted of any criminal offence since 2006, although he absconded in August 2006 and did not come to notice of the police until April 2009, very nearly three years later. He noted that the appellant was then in prison and immigration detention until released on temporary admission in 2014. In reality therefore, the judge concluded that it had only been since that release on temporary admission that the appellant had had any opportunity to commit "detectable criminal offences", although the judge accepted that that was in fact the position, i.e. that he had not been convicted of any offences. The FtJ did however, also note that this was at a time when the appellant was potentially facing deportation.
38. At [45] he said that he was "less persuaded" that the appellant did not commit any offences while he had absconded and was living in Sheffield. He said that that was "partly" because of the arrest on 24 April 2009, but also because of the number of aliases recorded in respect of him in the PNC record, one of which is from the South Yorkshire Police. He noted that although a name given by an arrested person is not the only means of identifying them, the use of those aliases does raise the clear possibility that the appellant "could have offended" but not been detected in his true name.
39. Whilst, as Mr Walker accepted, it was to some extent speculation on the part of the FtJ to conclude that it was not surprising that South Yorkshire Police decided not to pursue an offence of theft from a shop given what the appellant was then facing (four and a half years' imprisonment), it seems to me that that was in any event a reasonable conclusion on the part of the FtJ. It is also to be remembered that for a person to be arrested for an offence there must be reasonable cause to suspect that person of having committed the offence. That must have applied in relation to the appellant's arrest in April 2009 for theft.
40. In any event, the judge did not rely solely on the arrest on 24 April 2009 to justify the conclusion that the appellant had not rebutted the presumption of being a danger to the community. It is apparent from his decision that there were other factors involved in that conclusion. As I have already

indicated, the judge's assessment of this issue started with his consideration of the seriousness of the offence of conspiracy to defraud, and in respect of which the appellant was before the FtJ attempting to minimise his involvement, contrary to the clear assessment of the level of his criminality by the sentencing judge. The judge noted that the appellant had made a late application for permission to appeal against his conviction and/or sentence. That was so notwithstanding that he had absconded and was convicted by a jury. The fact that the appellant attempted to minimise his involvement in the offence was a relevant factor for the judge to take into account. Likewise, his use of aliases to which the judge referred.

41. Even if it could be said that the judge indulged in impermissible speculation in relation to the arrest for an offence of theft in April 2009, I cannot see that that amounts to an error of law, still less one that requires the decision to be set aside.
42. In summary therefore, I am not satisfied that there is any error of law in the decision of the FtT in any respect.

Decision

43. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal on all grounds therefore stands.

Upper Tribunal Judge Kopieczek

23/03/16