



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00003/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5 November 2013

Determination Promulgated
On 11 November 2013
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Before

Lord Boyd of Duncansby sitting as a Judge of the Upper Tribunal
Upper Tribunal Judge Kekić

Between

NKM
(anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation:

For the Appellant: Ms S Banda, Legal Representative. Duncan Lewis Solicitors.
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

1. This matter comes before us following the decision of Upper Tribunal Judge Rintoul on 23 September 2013 to grant permission to appeal against the determination of a panel of the First-tier Tribunal chaired by Judge Walters dismissing the appellant's deportation appeal.

Background

2. The appellant was born on 16 December 1978 and is a Zimbabwean national from Harare. He entered the UK as a student in June 2004 with two years' leave to enter. He then overstayed and in January 2005 was convicted of the first in a series of several convictions, the most recent of which was on 12 November 2012. In 2009 he claimed asylum but that was refused in January 2012. In December 2012 a deportation was made by virtue of section 32(5) of the UK Borders Act 2007.
3. The appellant's case is that he would be at risk on return to Zimbabwe on account of his support for the MDC. He claimed to have attended two rallies in Zimbabwe and to have distributed flyers. He also claimed that he had been attacked by ZANU PF supporters in 2002 but managed to escape them. His mother had told him that ZANU PF supporters had continued to visit since his departure. The appellant had a child in the UK with a former partner. In 2005 he was diagnosed as HIV positive. In 2008 he got married.
4. The panel considered the appellant's convictions and found he showed no signs of remorse and had done nothing to address his dishonesty. It considered that there were many significant contradictions in his account of events in Zimbabwe and rejected his claim that he had been attacked by ZANU PF and that supporters had continued to look for him over the next ten years. It found he had not taken part in any political activities in the UK. The Tribunal also noted that appellant's delayed asylum claim. It concluded that he had not made out his case for international protection.
5. The panel also gave consideration to the appellant's medical condition but found that it did not engage Articles 2, 3 or 8. It took account of the public interest in his deportation balancing that against the factors argued in his favour. It found that there was no evidence that he was in contact with his daughter particularly as her mother wanted to exclude the appellant from having any contact and no civil proceedings for contact had been initiated. In any event neither the child, nor the mother (both Zimbabwean nationals) had any leave to remain here and there was no evidence to show that the child had lived here for a continuous period of seven years.
6. The panel considered the appellant's marriage but noted that his wife had not attended the hearing and had not written in support of it. There being no evidence of contact with her other than the appellant's oral evidence, the panel concluded that family life had not been established. It accepted that there was private life on account of his presence here and a short period of work but found that in all the circumstances his deportation was justified.

Error of Law

7. The appellant's case was that the panel had failed to consider and apply the country guidance case of CM (EM - Country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC), the Country of Origin Information Report and the Operational Guidance Note (OGN) of February 2013. It was maintained this information was in the appellant's bundle and in the skeleton argument relied upon. The grounds then proceed to set out the head note of CM and maintain that none of the principles therein were applied.
8. The grounds also argue that the panel gave inadequate reasons for its findings and that there was no consideration given by the panel to the delay on the part of the respondent in deciding the asylum claim.
9. At the hearing before us, Ms Banda only made submissions with respect to the panel's failure to apply CM.
10. Having considered the submissions made by the parties, we indicated that we would be upholding the determination and we now give our reasons for so doing.

Conclusions

11. We accept that, where applicable, country guidance should be considered and applied. It would have been preferable, in this case, had the panel shown that CM had been considered even if it was then found to have no bearing on the case or its outcome. To that extent, the panel did err. However, for the following reasons, we find that the error does not require the setting aside of the determination.
12. The first point to make is that even if CM had been considered, it would not have assisted the appellant. Ms Banda was asked to explain how the principles set out in the head note (as contained in the grounds) would have supported the appellant's case. She relied on notes 5, 7 and 9 which pertain to returns to Harare. However, even if the appellant were returning to a high density part of the city, given his lack of MDC profile it is difficult to see how he could bring himself into the categories of those who might feature of a list of those targeted for harassment (head note 5). The appellant has no sur plus political profile. His activities in Zimbabwe, even if accepted, were extremely low level in that they amounted to attending two rallies and distributing flyers. He has family who remained there after he left. It was not accepted there was any interest in him by ZANU PF supporters over the following years. There being no real risk of serious harm in Harare, the issue of relocation to another area (head note 7) does not arise. Ms Banda did not explain how the Tribunal's failure to refer to the improvement of the economy in head note 9 has disadvantaged the appellant.

13. The second point to be made is that although CM was contained in the appellant's bundle, it may be seen from the Tribunal's Record of Proceedings that it was only alluded to in the briefest of terms in the submissions and that contrary to what the grounds assert, it does not feature at all in the skeleton argument except for being mentioned in the list of cases contained in the appellant's bundle (on page 1).
14. Third, no evidence was called on whether the appellant lived in a high, medium or low density area of Harare or on the possibility of relocation elsewhere. In the absence of any evidence on this issue and the lack of submissions, either orally or in the skeleton argument, it is difficult to see how the panel could have applied CM to the facts of the appellant's case even if it had been considered.
15. Ms Banda did not seek to make submissions on any of the other grounds for permission and we need not therefore address those. She did however raise a new ground - that the panel had erred in considering the appellant's convictions for offences of dishonesty when assessing credibility. Quite apart from the fact that no application for permission to vary the grounds was sought, it is plain from the determination that the panel did not use the appellant's dishonesty as a means for discrediting his asylum account. The panel pointed out inherent inconsistencies within the accounts given, noted the seven year delay in the making of the asylum claim and the lack of any political activity in the UK and concluded that the claim had not been made out. That was a findings fully open to them on the evidence.
16. Ms Banda did not seek to challenge any of the adverse findings and conclusions pertaining to the appellant's health, section 55 and his marriage.
17. The Tribunal made an anonymity order which we continue.

Decision

18. The First-tier Tribunal did not make an error of law and the decision to dismiss the deportation appeal is upheld.

Signed:

Dr R Kekić
Upper Tribunal Judge

Date: 7 November 2013