Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00244/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 31 July 2013	**On : 6 August 2013**

Before

UPPER TRIBUNAL JUDGE KEKIĆ
UPPER TRIBUNAL JUDGE KEBEDE

Between

DENSTERN LEVIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Daykin, instructed by Blavo & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before us following a grant of permission to appeal on 25 June 2013.

2. The appellant is a citizen of Zimbabwe, born on 24 April 1982. He claims to have entered the United Kingdom in 2000 using his own passport and to have been granted six months leave to enter as a visitor. He remained in the United Kingdom thereafter without leave.

3. On 25 June 2003 he was convicted of breach of a community punishment order for which he received a fine of £50. On 25 July 2005 he was convicted of various offences committed between December 2003 and June 2005, as follows: failing to surrender to custody on 8 January 2004 for which he received a two week sentence of imprisonment; restricting or obstructing a constable on 5 June 2005 for which he received a one month sentence of imprisonment; failing to surrender to custody on 14 June 2005 for which he received a one month sentence of imprisonment; driving a motor vehicle with excess alcohol on 27 April 2005 for which he received a sentence of imprisonment of two months; driving a motor vehicle with excess alcohol on 6 June 2005 for which he received a sentence of imprisonment of four months; and using a motor vehicle with excess alcohol on 18 December 2003 for which he received a sentence of imprisonment of one month.

4. On 26 May 2006 the appellant was convicted at Basildon Crown Court on three counts of supplying class A controlled drugs, namely cocaine and heroin, for which he was sentenced to two years and one month imprisonment. On 25 July 2006 he was convicted of failure to surrender to custody on 10 May 2005 for which he was sentenced to one month imprisonment concurrent.

5. On 9 October 2006 a decision was made to deport the appellant from the United Kingdom, against which he appealed. His appeal was dismissed as out of time on 24 October 2006. On 19 December 2006 a deportation order was signed against the appellant and served on him on 21 December 2006.

6. On 1 April 2009 written representations were made on behalf of the appellant requesting that the deportation order be revoked. It was submitted that it would be irrational and unreasonable for the Secretary of State to implement removal, given the passage of time since the deportation order had been made, since when the appellant had been granted bail and had complied with the conditions of bail. In addition, it was submitted that deportation would breach Article 8 of the ECHR in view of the appellant's ongoing relationship since September 2005 with a British citizen, Carolyn Mairs, with whom he had been living since April 2007. Reference was made also to his close relationship with Ms Mairs' family, to the problems his mother had faced in Zimbabwe and his lack of knowledge of her whereabouts, to the risk of returning to Zimbabwe as a person unable to demonstrate loyalty to Zanu-PF and to the fact that he had, since his release from detention, enrolled on and completed various courses.

7. The appellant was invited to, and attended a screening interview and an asylum interview on 11 May 2010 and was subsequently invited, in September 2012, to complete a questionnaire. On 24 October 2012 he was informed about the intention to exclude him from the protection of the Refugee Convention pursuant to Article 33(2) and section 72 of the Nationality, Immigration and Asylum Act 2002. He was invited to rebut the

presumption that his continued presence in the United Kingdom would constitute a danger to the community.

8. On 16 January 2013 a decision was made to refuse to revoke the deportation order. The respondent noted the statements submitted in support of the appellant's case by his partner and her parents and took into account his educational qualifications and character references. It was noted that he had been offered employment with a company for whom he had undertaken voluntary work. However the respondent concluded that section 72 of the 2002 Act applied to him and certified that the presumption under section 72(2) applied. He was accordingly excluded from the protection of the Refugee Convention and, likewise, from humanitarian protection. It was considered in any event that he would not be at any risk on return to Zimbabwe. It was not accepted that he had no contact with his mother and it was considered that he had family remaining in Zimbabwe. His claim was accordingly refused under Article 3 of the ECHR. With regard to Article 8, the respondent considered that the appellant could not meet the requirements of paragraphs 399 or 399A of the immigration rules. It was accepted that he was in a subsisting relationship with his British partner but any interference with his family and private life was not considered to be in breach of his Article 8 rights.

Appeal before the First-tier Tribunal

9. The appellant's appeal against that decision was heard in the First-tier Tribunal on 9 May 2013, before a panel consisting of First-tier Tribunal Judge Morris and Mr S Percy. The panel were not satisfied that the appellant had rebutted the presumption under section 72 of the 2002 Act. They considered that he would not be at risk on return to Zimbabwe and they dismissed his appeal on asylum, humanitarian protection and Article 3 human rights grounds. It was conceded on behalf of the appellant that he could not meet the requirements of paragraph 339(a) and (b) or 399A of the immigration rules. With respect to Article 8, the panel accepted that he had established a family and private life in the United Kingdom. However they concluded that the factors in his favour were outweighed by the public interest in his deportation and they accordingly dismissed the appeal on that basis.

10. Permission to appeal to the Upper Tribunal was sought on the following grounds: that the panel had wrongly applied the automatic deportation provisions under section 32(5) of the UK Borders Act 2007 rather than applying paragraph 390 of the immigration rules regarding revocation of a deportation order; that they had failed to make a proper assessment of risk of re-offending; that they had reached an erroneous conclusion that the appellant had failed to rebut the section 72 presumption that he presented a danger to the community; and that they had taken an erroneous approach to the Article 8 balancing exercise with respect to the weight attributable to family life and to the period of time that had elapsed since the making of the deportation order.

11. In granting permission to appeal on 25 June 2013, First-tier Judge Coates found all grounds to be arguable.

Appeal before the Upper Tribunal

12. The appeal came before us on 31 July 2013. We heard submissions on the error of law.

13. Ms Daykin expanded upon the grounds of appeal. With regard to the first ground, she submitted that the panel had failed to apply the correct test relating to revocation of a deportation order and had instead erroneously applied the provisions relating to automatic deportation. With regard to the second ground, they had failed to make any findings on risk of re-offending. Their findings at paragraph 41 of their determination did not amount to an assessment of risk and had been made on the basis of an assessment by the probation services dating back to 2007. The question of risk had not been put into the balancing exercise properly. The same was relevant to ground 3 with respect to their findings in regard to the presumption under section 72 of the 2002 Act. With regard to ground 4 the panel had failed to consider the positive aspects of the appellant's family and private life and the fact that there had been no attempt to carry out the deportation order for several years. Their findings suggested that they were expecting his partner to have ended the relationship because of his convictions. The last sentence of paragraph 44 of the determination suggested that they had considered the appellant's family and private life to have carried no weight.

14. Mr Avery, in response, submitted that the panel had not applied the wrong test but were entitled to consider current legislation and to take account of the Secretary of State's expression of the public interest and the provisions for deportation as set out under section 32 of the 2007 Act. The second ground, he submitted, was a disagreement with the panel's findings on risk of re-offending and, in making their findings, they had considered the appellant's period of good behaviour and the recent probation assessment. With regard to the third ground, the section 72 certificate was not material to the outcome, and in any event the panel adequately dealt with the matter. They were entitled to find that the appellant was a danger to the community, as class A drugs offences were serious. As to ground 4, there was no need for the panel to make findings on the evidence of the appellant's partner and her parents as they had accepted that family life existed. They did not suggest that his partner should have given up the relationship but were simply applying relevant case law. With regard to the length of time since the deportation order had been made, it was not surprising that the appellant had not been removed earlier, given the fluctuation in the position of the courts in respect to Zimbabwe.

15. Ms Daykin responded by reiterating the points made previously.

Consideration and findings.

16. In our view the panel did not make any error of law in their decision.

17. With regard to the first ground we note the reference by the panel, at paragraph 21 of their determination, to the automatic deportation provisions in section 32(5) of the 2007 Act and the suggestion that that indicated a failure to apply the correct test relating to the

revocation of a deportation order. However we find merit in Mr Avery's submission that the panel were entitled to consider the relevant legislation and the expression, by the Secretary of State, of her policy at the current time, when the decision was made to revoke the deportation order. The panel were plainly aware that this was a revocation case and they set out the appropriate legal framework at paragraph 10 of their determination.

18. The grounds do not, in any case, suggest that the panel thereby failed to take account of any relevant factors in their findings. It is clear from the grounds of appeal before them, included at pages 16 to 18 of the appeal bundle, that the appellant's case was pursued before them on Article 8 grounds, on the basis of his family and private life, with asylum grounds set out in the supplementary grounds at pages 19 to 21. Those were precisely the grounds upon which the panel considered the appellant's case. There was certainly nothing before them to indicate any further basis upon which the appellant's case was being pursued relevant to paragraph 390 of the immigration rules such as particular compassionate circumstances. Accordingly the grounds before us fail to demonstrate that the panel applied the wrong test or that, in referring to the provisions of automatic deportation, they considered matters not relevant to the appellant's case or failed to consider relevant factors.

19. We also concur with Mr Avery's view that ground 2 amounts to little more than a disagreement with the panel's findings with respect to the risk of re-offending. At paragraph 36 of their determination they considered the strong public interest in the protection of the public by preventing further offending and in deterring others from committing similar offences. They noted the seriousness of the offence. At paragraph 37 they went on to consider the risk of re-offending, taking particular note of the appellant's history of offending over the period 2001 to 2006, commencing shortly after his arrival in the United Kingdom.

20. The panel then went on, at paragraph 38, to consider factors weighing in the appellant's favour, taking into account in particular the reports of 26 November 2007 and 9 March 2013 from the probation services. They noted at paragraph 41 that the latter referred to the risk assessment at the time of his licence period in 2007/8 and was based on the assumption that he had been law-abiding since his licence expired in 2008 given that he had not come to their attention since then. Most significantly they considered, at paragraph 41, the passage of time since the deportation order was made and the appellant's behaviour and lack of offending since that time. They considered relevant case law in that respect, namely A.A. v. the United Kingdom - 8000/08 [2011] ECHR 1345, and applied the principles in that case to the appellant's own circumstances, but identified distinguishing features in his case, namely the previous risk assessment, his criminal history and the fact that he had committed the offences as an adult. On the basis of all those considerations they concluded that the appellant could "reasonably be expected to cause disorder or to engage in criminal activities such as to render his deportation necessary", mirroring the wording used at paragraph 63 of the judgment in AA. Contrary to the assertion made in the grounds of appeal, it is plain that the panel gave careful consideration to all matters relevant to the risk of re-offending and undertook a detailed assessment of risk. They were entitled to reach the findings that they did.

21. We make the same finding in regard to the third ground of appeal which amounts, in essence, to the same point, albeit in relation to the presumption under section 72 of the 2002 Act. The panel properly identified that the test was a two-stage one and that it had to be established not only that the appellant had been convicted of a particularly serious crime, but also that he was a danger to the community. At paragraph 17 of their determination they found that he was a danger to the community and in so doing referred to the findings that were to follow, which was clearly intended as a reference to their findings on risk of re-offending. Again, for the reasons given above, they were entitled to reach the conclusion they did. In any event, as Mr Avery submitted, the findings on section 72 were not material, given that it was considered that the appellant was not in fact at risk on return to Zimbabwe and was thus not entitled to protection under the Refugee Convention or to humanitarian protection, findings not challenged before the Upper Tribunal.

22. With regard to the fourth ground, the panel were not required to set out the evidence of the witnesses in detail, given that there was no dispute that family and private life had been established. The panel referred to their evidence as necessary and were entitled to consider the circumstances of the relationships and the fact that they had developed in the knowledge of the appellant's criminal history and whilst he was in the United Kingdom illegally. Indeed, at paragraph 39 they noted that the members of the Mairs family had been willing to turn a "blind-eye" to the appellant's offences. The grounds assert that the panel were, in so doing, suggesting that the witnesses were wrong to develop the relationships in such circumstances and accordingly placed little weight upon them. However that was not what they were doing: as Mr Avery submitted, it is plain that they were simply applying the principles and guidance in relevant case law, to which they specifically referred at paragraph 44, in regard to the weight to be accorded to the family and private life. The panel considered at some length the appellant's behaviour and activities since being released from detention and the significant period of time that had elapsed since the deportation order was made without being implemented and plainly accorded this weight in the balancing exercise. We are mindful of the fluctuation in the position of the courts in relation to removals to Zimbabwe, as submitted by Mr Avery, which may well have impacted upon the delay in implementing the deportation order, although we note that that was not a matter that was put to the panel.

23. In any event, the panel were ultimately entitled to place the weight that they did upon the appellant's lack of lawful status in the United Kingdom, his contradictory evidence about his family circumstances in Zimbabwe, his history of offending commencing within a year of arriving in the United Kingdom and the seriousness of his most recent offence, and to conclude that the balance fell in favour of the public interest in his deportation. That was a conclusion that was open to them on the evidence before them. As such we do not find that they made any errors of law in their decision.

DECISION

24. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. We do not set aside their decision. The decision to dismiss the appellant's appeal against the refusal to revoke the deportation order therefore stands.

Signed 

Upper Tribunal Judge Kebede