Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00754/2013

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates Court	**Determination Promulgated**
On 15th October 2013	**On 22nd October 2013**

Before

UPPER TRIBUNAL JUDGE SOUTHERN
UPPER TRIBUNAL JUDGE COKER

Between

VERNON EUGENE MITCHELL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Selway of Halliday Reeves Law Firm, Solicitors
For the Respondent: Ms M Morgan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Zimbabwe born on 14th August 1971, appeals against a decision of a panel of the First-tier Tribunal (Judge Lloyd sitting with Mr Sandall, a non-legal member of the Tribunal) who, by a determination promulgated on 18th July 2013, dismissed his appeal against a decision of the respondent that he should be deported. That decision was made by the respondent pursuant to the "automatic deportation" provisions of section 32 of the UK Borders Act

2007. That was because, as the appellant had been convicted of making false representations to make gain for himself or cause loss/expose others to risk, failing to answer to bail and other lesser offences for which he was sentenced to a total of 27 months imprisonment, he was a foreign criminal in respect of whom the respondent was required to make deportation order, such deportation being deemed to be conducive to the public good because of the provision of section 32(4) of the 2007 Act.

2. The challenges to that determination raised in the grounds for seeking permission to appeal are in essence challenges to the findings by the panel in so far as the Article 8 human rights claim is concerned. Permission was granted on those grounds and, in addition, on the basis that it was arguable that the provisions of paragraph 399A had not been properly canvassed before the panel and that the calculations provided by the appellant showing that he did not meet the 20 year residence requirement because of imprisonment were inaccurate.

3. Paragraph 399A of the Immigration Rules clearly states that periods of imprisonment are to be disregarded when calculating length of residence. Mr Mitchell does not have the requisite 20 years residence when his terms of imprisonment are taken into account. He does not meet the requirements of paragraph 399A, as was properly conceded by Mr Selway before us and indeed considered specifically in paragraph 64 of the First-tier Tribunal panel's determination.

4. Mr Selway sought to rely only upon his grounds seeking permission to appeal and did not seek to elaborate them.

5. In terms of Article 8 there was no challenge to the recording of evidence by the First-tier Tribunal; rather the challenge was to the weight placed upon that evidence and the findings reached. In essence the grounds sought to challenge the findings on the basis that:

    a. The panel found no material inconsistency in the facts as put forward yet reached different conclusions to those put forward by the appellant;
    b. The panel accepted the Probation service assessment of risk rather than expressly setting out its own views as to risk;
    c. There had been no balancing exercise by the panel which had only considered the appeal under the Immigration Rules;
    d. The panel failed to take account of factors positive to the appellant;
    e. The panel failed to take account of the impact of removal on family members
    f. The panel failed to give consideration to the difficulties the appellant would face on return to Zimbabwe after 21 years away;

g. No real finding on whether the appellant's light complexion would result in him having difficulties in Zimbabwe.

6. Although it is correct that the panel found no material inconsistency in the evidence before it, that does not necessarily result in a finding that the removal of the appellant pursuant to the deportation order falls within one of the exceptions. The panel considered the evidence and in a detailed and coherent determination set out its reasons for its own conclusions on the weight to be given to that evidence in reaching its findings. In so doing the panel gave legally sufficient reasons for reaching conclusions that were plainly open on the evidence.

7. In so far as the probation report is concerned, although the grounds challenge the acceptance by the panel of its findings, there is no assertion that the panel reached an incorrect conclusion or what other evidence there was before the panel which should or could have led to a different conclusion.

8. The panel referred specifically to the appellant's lack of political profile and the lack of evidence that he would suffer ill treatment because of his mixed race (paragraph 53); that his long absence from Zimbabwe was a significant factor as was his family in the UK, his lack of family in Zimbabwe and his own view that he was rehabilitated (paragraphs 65, 70, 71, 72 and 73). It is simply incorrect to assert that the panel failed to take account of factors positive to the appellant, to the impact on his family or his absence from Zimbabwe.

9. The panel specifically considered the appellant's appeal under the Immigration Rules and also 'on a free standing basis' in line with caselaw as it then was. In paragraph 74 the panel specifically balanced the "personal factors against the history of offending…… Having taken into account all the evidence [the panel] find the Home Office decision was proportionate and there was no breach of Article 8." There can be no criticism of the panel for undertaking this 'two stage approach' because that was the approach as required at that time. Although the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192* has now made clear that the Rules in fact provide a complete code and so it is not necessary to look outside them, nothing turns in this case upon the route taken by the panel in reaching their conclusion.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and we do not set the decision aside; the decision of the First-tier Tribunal panel to dismiss the appeal stands.

The appeal is dismissed.

Anonymity:

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

There was no application to lift that order and it therefore continues (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 17th October 2013

Judge of the Upper Tribunal Coker