Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01258/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 20th December 2013	**On : 6th January 2014**
	……

Before

Upper Tribunal Judge McKee

Between

E.M.
(anonymity direction continued)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Keelin McCarthy, instructed by Lawrence Lupin Solicitors
For the Respondent: Mr T. Wilding of the Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant, Ms EM, was born in Zimbabwe 36 years ago, and has apparently been living in the United Kingdom (although not with leave) since 1999. In 2001 she gave birth to a son, SS, who has a hearing impairment as a result of meningitis. Motherhood did not prevent Ms EM from embarking in 2002 on what the judge at Sheffield Crown Court described as a career of crime. She had notched up 26 previous convictions by the time she was convicted in April 2009 at Sheffield Magistrates' Court on 19 counts of dishonestly making false representations, and one

count of obtaining services by deception. She was committed for sentence to the Crown Court, where the judge called her "*a thoroughly dishonest lady*" who had perpetrated "*sophisticated, well-organised crime*." Despite her guilty plea, EM was sentenced to 2½ years in prison.

2. In the meantime, Ms EM had split up from her partner, the father of SS, who is the primary carer of the child and now has leave to remain as a refugee until 2015. The boy has leave in line with his father, and lives with him in Sheffield, where he receives therapy to improve his hearing. His mother has been living in Milton Keynes since her release from detention, and visits him in Sheffield twice a month, while he also sometimes stays with her. SS now has a half-sister, HA, born in November 2012 to a Nigerian man who appears to have dropped out of the picture.

3. It was also in November 2012 that a deportation order was made under section 32(5) of the UK Borders Act 2007. The subsequent appeal came before the First-tier Tribunal on 1st August 2013 and was dismissed by a panel comprising Judge Kelsey and Mrs Lydia Schmitt, JP. An application for leave to appeal to the Upper Tribunal was initially unsuccessful, but permission was granted on renewal, and when the matter came before me today Miss McCarthy (who had also appeared below) took me through the detailed grounds of appeal which she had settled. These were vigorously rebutted by Mr Wilding. I am grateful to both representatives for highlighting all the salient points in this appeal, and for putting their opposing cases so lucidly. After hearing their submissions, it seemed to me that the panel had not made an error of law, requiring their determination to be set aside. My reasons for that conclusion are set out below.

4. I shall first deal with something which clearly <u>is</u> an error, but not a material one. Ms EM had claimed asylum in 2005, but on being granted temporary admission she failed to comply with her reporting conditions or to attend for interview. She claimed asylum again in 2010, when she was detained under Immigration Act powers on completing the custodial part of her sentence. The claim was rejected, and was certified under s.72(9)(b) of the Nationality, Immigration and Asylum Act 2002, because the length of Ms EM's sentence raised the presumption that she constituted a danger to the community. Under section 72(10) of the Act, the panel were obliged to deal first with the certificate. If they upheld it, they would have to dismiss the appeal on asylum grounds.

5. The presumption, however, is rebuttable, and the First-tier Tribunal must give reasons for finding that the presumption has, or has not, been rebutted. "*We have already*", say the panel at paragraph 29 of their determination, "*given our reasons for upholding the certificate*." But they had given no proper reasons at all. At paragraph 6, they observed that the presumption arose because the appellant had been sentenced to at least two years in prison, and "*in those circumstances, we are satisfied that we must uphold the certificate*." That, of course, does not follow. The presumption would be irrebuttable, if a two-year sentence was inevitably sufficient to justify the certificate. The panel do, it is true, go on to say that in upholding the certificate, "*we have taken into consideration all the issues we set out in this determination*." But something more specific is needed by way of explanation.

6. As Mr Wilding submits, however, this error is not material. Despite upholding the certificate, the panel did in fact go on to consider the asylum claim, setting out at paragraphs 30-31 the plethora of inconsistencies and contradictions in her account, as given at various times, which deprived EM's asylum claim of any credibility. At paragraph 32 the panel refer to "*a claim by the appellant and her representatives that she holds French citizenship*." That, Miss McCarthy points out, is not so. It was the Home Office that mistakenly believed the appellant to be French. But the panel's impression that the mistake was due to the appellant's dishonestly "*strengthens the conclusions that the appellant is an untrustworthy witness and that we can place no trust in the appellant's evidence*." Miss McCarthy contends that this erroneous impression wholly undermines the panel's negative credibility finding. I do not think it does. There was plenty of other material, from the host of discrepancies in the appellant's account to the judge's sentencing remarks at Sheffield Crown Court, to justify the conclusion that Ms EM's claim to be at risk in Zimbabwe was not to be believed.

7. This conclusion did not, however, affect the panel's assessment of Ms EM's relationship with her son. From what they observed of the interaction between mother and child at the hearing, "*there was clearly a loving bond between them*." This observation at paragraph 33 is reiterated at paragraph 36. The oral evidence of SS is summarised at paragraph 21, and Miss McCarthy insists that the panel have misquoted her when they say that, according to counsel, Ms EM wanted the boy to say a few words to the panel. It was SS himself, she says, who asked for this opportunity. I do not think anything turns on this. The panel accepted that there was a close bond between mother and son. The crucial question, as far as error of law is concerned, is whether the panel included this bond in their weighing of the proportionality scales.

8. At paragraph 36, the panel refer to a shared residence order made by a Family Court. In fact, no order needed to be made, because the father of SS has no objection to the appellant having contact, and having SS to stay with her occasionally. Where the panel really went wrong, argues Miss McCarthy, was in downplaying the effect on SS of separation from his mother, such that it cannot be said that his best interests have been properly taken into account. I do not think that is right. The panel acknowledged that SS "*would miss the visits of his mother*" and that, if she were outside the UK, "*letters and phone calls cannot be a substitute for personal company*." (Miss McCarthy doubts whether SS could hear very much over the telephone.) But the point which the panel go on to make at paragraphs 37 and 39-40 is that the public interest can outweigh even the happiness of a child. They cite *SS (Nigeria)* as a case where the private and family life aspects were "*not sufficiently strong to prevail over the extremely pressing public interest in the appellant's deportation*." In *SS* it was the father who was facing deportation, while the mother was the primary carer, having looked after the child while the father was in prison. In the instant case, it was the mother who was facing deportation, while the father was the primary carer, having looked after the child while the mother was in prison.

9. One aspect of Article 8 which, Miss McCarthy submits, the panel overlooked altogether is the relationship between SS and his baby sister, HA, whom the panel envisage going with her mother to Zimbabwe. Miss McCarthy had included, in her

submissions, that SS was very close to his sister, but the panel did not place this factor onto the Article 8 balance. I do not think, however, that this omission is material to the outcome of the appeal. HA was only nine months old when the appeal came before the First-tier Tribunal. The relationship between SS and HA, half-siblings who did not live together, was inchoate at that stage. It could not carry much weight in the Article 8 balance.

10. On the other hand, the appellant had, as the panel say at paragraph 40, "*committed a large number of serious offences*." In finding that the best interests of SS would be served by continuing to have a stable home with his father and contact with his mother, the panel emphasized the stability of the paternal connexion by supposing that there was "*still a fair likelihood that the appellant will re-offend*." The appellant has not re-offended, Miss McCarthy reminds me, since her release in 2011. Mr Wilding points to a 'medium' risk of re-offending given in the Home Detention Curfew Report, but as the report dates to September 2009, that assessment may be out of date. But as the Court of Appeal has reminded tribunal judges in *OH (Serbia)* and a line of other cases, the risk of re-offending is not the most important facet of the public interest when serious offences have been committed.

11. At the end of the day, the challenge to the First-tier determination comes down to a disagreement about the weight to be given to the various factors involved, and matters of weight are classically not matters of law. Apart from the relationship between SS and HA (which, as I say, is at a very early stage), it cannot be said that the panel have overlooked material factors. To put the matter starkly, the panel have found the public interest in the prevention of crime to outweigh the loss to SS of face-to-face contact with his mother. If the best interests of the child were the paramount consideration in deportation appeals, the panel would have erred. But the best interests of the child are not a trump card, and I cannot say that the panel, in deciding that the Article 8 balance came down on one side rather than the other, committed an error of law.

DECISION

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

29th December 2013