**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/02334/2013

**THE IMMIGRATION ACTS**

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| **Heard at Royal Courts of Justice, Strand** | **Determination Promulgated** |
| **On 30 June 2014** | **On 7th July 2014** |
| **Prepared 30 June 2014** | |

**Before**

**UPPER TRIBUNAL JUDGE MCGEACHY**

**Between**

**SIBONGILE NOMTHAMBDAZO DUBE**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Howard of Messrs Fountain Solicitors
For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant, a citizen of Zimbabwe born on 1 December 1991 appeals, with permission against a determination of the Tribunal (Judge of the First-tier Tribunal Pirotta and Mr G F Sandall, non-legal member) who in a determination promulgated

on 8 April 2014 dismissed the appellant's appeal against a decision of the Secretary of State made on 7 November 2013 to make a deportation order under the provisions of Section 32(5) of the UK Borders Act 2007.

2. The appellant entered Britain on 17 November 2005 with leave to enter valid until 7 September 2010 to join her mother who is settled here.

3. On 21 January 2011 she was convicted at St Albans Crown Court for robbery and sentenced to two years' imprisonment. An appeal against that decision was dismissed on 13 May 2011 by the Court of Appeal. On 31 May 2011 the appellant was served with a notice of liability to automatic deportation. On 21 January 2012 she was transferred to immigration detention. Although she was released on bail she later failed to adhere to reporting restrictions and between May 2012 and February 2013 she was classed as an absconder.

4. Although a decision was made to deport the appellant in October 2012 that was not served upon her. She was detained on 5 February 2013 because she had breached her release licence and was returned to prison to finish her custodial sentence. When that was completed she was again detained under immigration powers.

5. The Tribunal heard evidence from the appellant and from her mother noting arguments being put forward that the appellant was in the role of a parent exercising responsibility for her younger sister and therefore it was claimed that she was eligible for consideration under paragraph 339A of the Rules. They noted that there had been a failure to comply with directions and that the appellant and her mother referred to a letter, which related to the appellant's sister, from a psychologist, which should have been served but had not been signed. It was claimed that that letter was material and the Tribunal granted further time for submission of the letter until 7 April. On 7 April the appellant's solicitors said that the report had still not been signed but asked for time to forward it to us as soon as possible. It was not received by the Tribunal before the determination was drafted.

6. The Tribunal noted that the appellant had come to Britain at the age of 14. They noted the terms of her sentence and the sentencing remarks of the recorder who said that the appellant had been found in possession of money and car keys taken from the taxi driver whom she had robbed after she and her friend had directed him to a remote spot. When her co-accused had held something hard on his back the appellant had threatened him that he would be shot. They noted the taxi driver's victim statement which said that he had believed that he would be killed and never see his wife and children again and had been unable to pursue his career as a taxi driver with the same security and application as before for fear of a further robbery. The Tribunal also noted that the judge had taken into account mitigation in that the appellant and her co-accused were 18, neither had any previous convictions and that it was claimed that the attack was uncharacteristic. They noted that there were claims that the appellant's mother and sister had HIV and that her sister also had behavioural problems which meant that she would act up if the appellant was not

present. It was the appellant's mother's evidence that the appellant was "a pillar" in assisting with her sister.

7. The Tribunal noted the various statements made by the appellant, her mother, her brother and her sister and the pre-sentence report. They noted that the appellant had told the probation officer that she wanted money from the robbery to pay a drug debt of £400 and to pay for return plane fares to Zimbabwe because she believed her mother intended to send her there. Although the appellant had worked and earned an income she had spent her money on clubs and buying clothes. She had not wanted her mother to discover her drug taking and had collaborated with her co-accused to obtain money. The appellant had been made to leave home and stay with a cousin in a different part of London because of her mother's anger with her but she hoped to settle with her family when they moved to Manchester after her sentence. The Tribunal noted that the probation officer had concluded that the appellant was not being totally forthcoming about her lifestyle choices and that she had shown a certain amount of sophistication in taking the taxi driver's keys, disabling him from a fast escape. The appellant was said to be a determined offender and potential danger to the public. The Tribunal recorded that the OASys Report indicated that the appellant was at medium risk of harm to others because of her poor decision making, risk taking behaviour, drug use and negative associates.

8. In paragraphs 42 onwards the Tribunal set out their findings of fact.

9. In paragraph 43 they noted that the appellant was supposed to have had a two year relationship with a woman called Katie Simmond but stated that that was not credible given that the appellant had been in custody for most of the last two years and she had not revealed any relationships when she had been interviewed prior to the making of the deportation order nor had she stated that she was a lesbian. There was nothing from Katie Simmond to back up the appellant's claim. They stated that:-

> "We are not satisfied to the appropriate standard of proof required of an appellant that she had a close relationship in the past or has a continuing relationship of any real substance, and it is not plausible that the appellant would have prevented her partner, who was willing to support her, from sending a statement or attending court in her support had there been a genuine relationship between them and reason to remain in the United Kingdom."

They noted that after her arrest the appellant had not been allowed by her mother to return home and lived elsewhere for a considerable time before sentence. They commented on the appellant's mother's response as being very extreme but referred to the fact that the appellant had been taking drugs and spending her income for her own purposes without making any contribution to her own or family expenditure.

10. They noted that the appellant's mother had said that she would send the appellant to Zimbabwe and concluded that the appellant's bad behaviour must have been more sustained and serious and that they were not satisfied to the appropriate standard of proof required "that her mother would have sent her to Zimbabwe if there were no

local ties". They did not accept the appellant's role in the family. They stated that there was no credible evidence the appellant's mother would not be able to cope with her own medical condition without the presence of the appellant and noted that the family had not supported the appellant in complying with her bail and licence conditions.

11. They concluded that the appellant had not discussed the offence with her family despite the claimed frequency of contact. The appellant had not known that her mother had had a partner after the end of her relationship with her previous partner and had not known that the appellant's mother was pregnant in April 2013 during a time when the appellant apparently lived at home. Having concluded that the relationships of the appellant with other members of the family were not close they went on to specifically refer to the claim that the appellant was pivotal in caring for her sister. They stated that the absence at the hearing of the appellant's sister had been explained and was accepted by them and indeed it was accepted that what had happened would have had an emotional impact on the appellant's sister but stated there was no credible evidence of dependency or reliance by any member and or in particular of the sister on the appellant. They stated that the appellant's sister had been able to live her life without the appellant for a considerable period and there was no independent evidence of self-harm or of any psychological problem or treatment of any special relationship between the appellant and her sister. They concluded the rights of the United Kingdom resident family were not affected by the removal of the appellant and that there were no reasons why the family could not visit the appellant in Zimbabwe if they chose.

12. Having considered the courses which the appellant had undertaken in prison they concluded that she would be able to work in Zimbabwe and that there were no exceptional circumstances which would "meet the criteria of for *(sic)* exceptions under Section 33 Borders Act 2007 to make her removal disproportionate."

13. In their final paragraph of the determination they stated that even if lesbian practices in Zimbabwe were against the law there is no evidence that the appellant would come to the adverse interest of the authorities as she had managed to live in a discreet manner in the United Kingdom – even her own mother had not met her friend. There was no reason to believe that the appellant would attract adverse interest in Zimbabwe if she continued to live as she had to date. They said that she had always lived discreetly and even her mother and brother had not been introduced to the appellant's friends or purported partner. They refer to gay and lesbian support groups and agencies in Zimbabwe who would be able to befriend, support and assist the appellant.

14. The conclusion of the Tribunal was that the balance of public interest against interference of the rights of the appellant was strongly weighed in favour of the public interest in her removal by reason of the seriousness of her offence.

15. They therefore dismissed the appeal on both immigration and human rights grounds.

16. The grounds of appeal first argued that there had been procedural unfairness in that the Tribunal had not given further time for the production of the psychiatric report and the fact that they had gone on then to reject the dependency between the appellant and her younger sister and indeed that the lack of consideration of the welfare of the appellant's sister and the fact the Tribunal had not considered her best interests as a primary concern was in breach of the guidance in the judgment of the House of Lords in **ZH (Tanzania) [2011] UKSC 4**. They also stated that the Tribunal had misconstrued the comment that the appellant's mother had considered returning her to Zimbabwe as that had never been the appellant's mother's intention but had merely been a threat. They asserted that the Tribunal were wrong to suggest that the appellant must have relatives in Zimbabwe but in any event they had not considered whether or not any ties she might have would be "meaningful" in accordance "with the decision of Blake J in **Ogundimu**". It was claimed that the evidence was that the appellant's mother was not working part-time but full-time and therefore it was said that the Tribunal had erred in their consideration of the evidence. The grounds further expanded on the claim that the appellant's sister relied upon her.

17. At the hearing of the appeal before me Mr Howard admitted that there was no psychiatric evidence to hand and that therefore he could not rely on the first ground of appeal. He however argued that the best interests of the appellant's sister had not been considered as a primary consideration and suggested that in considering the appellant's sister's rights too high a standard of proof had been applied. Moreover he argued that there was nothing to indicate that there was anyone for the appellant to return to in Zimbabwe and that the Tribunal should have taken that into account. Effectively, he suggested that the appellant had no cultural ties there.

18. Mr Howard referred to relevant country guidance cases suggesting first of all that the Tribunal had not properly dealt with the claim of the appellant that she was a lesbian and then made no findings regarding what would happen to her on return to her home area.

19. Mr Saunders in reply argued that the conclusions of the Tribunal were fully open to them on the evidence. He pointed out that it was not argued in the grounds of appeal that the Tribunal had not properly dealt with the appellant's claim to be homosexual and that they were entitled to treat the appellant as being a continuing threat in this country. They therefore asked me to dismiss the appeal.

**Discussion**

20. The first ground of appeal argued that the Tribunal were wrong not to wait for a psychiatric report – this appears to have been a report relating to the appellant's sister. The reality is that no report has ever been produced despite the claim that it

was merely waiting for signature and I therefore consider that there is simply no merit in that ground of appeal.

21. The grounds went on to state that the Tribunal had not properly considered the best interests of the appellant's sister who is aged 17. While it is correct the Tribunal did not state that they bore in mind Section 55 of the 2009 Borders Act nor indeed did they refer to the judgment of the House of Lords in **ZH (Tanzania)** the reality is that they very fully considered the relationship between the appellant and other members of her family including her sister. They were entitled to come to the conclusion that the appellant's ties with her family were not strong given the lack of knowledge that other members of the family appeared to know of her life and the appellant's lack of knowledge of their lives. Indeed it appears that she has not always lived with her family. There was no evidence whatsoever of her having a particularly important role with regard to her sister. It was accepted by the Tribunal that she and her sister would have some sort of relationship and that her removal might well upset her sister but there was nothing to indicate that the removal of the appellant would so severely affect the appellant's sister that it could be said that the Tribunal had not considered the appellant's sister's interests as a primary concern. They considered at very considerable length the appellant's lifestyle choices. The reality is that those can only have had a negative impact on the appellant's sister. I consider therefore that there is no material error of law in the way in which the Tribunal dealt with the relationship between the appellant and her sister.

22. It was claimed that the Tribunal had misunderstood the threat made by the appellant's mother that she would send the appellant back to Zimbabwe. The reality is that the appellant claimed that she had committed the robbery in part to obtain money so that the cost of travelling to Zimbabwe could be met and that rather indicated that the appellant herself took seriously the belief that she would be returned to Zimbabwe.

23. The appellant's mother in evidence referred to a number of relatives who had lived in Zimbabwe but had now gone to South Africa. It is of note that the appellant's evidence was that she had visited Zimbabwe in 2008 or possibly 2009 and stayed with a friend of her mother, Naomi whom she had called "auntie" although they were not related. She had said that they were not in contact and that she had no family in Zimbabwe. Given those factors it cannot be said that the appellant has no cultural tie with Zimbabwe.

24. However, this appellant is a Zimbabwean and she is now aged 23. There is no reason why she should not return to Zimbabwe on her own.

25. Mr Howard raised two further points. The first related to the fact that the appellant claimed to be a lesbian. It was the conclusion of the Tribunal which was clearly open to them that the appellant, if she were a lesbian, had lived extremely discreetly here and they considered there was no reason why she should not do so in Zimbabwe. They pointed to the fact that although the appellant claimed to have been in a

relationship with another woman here that could clearly not have been a strong relationship as the appellant was in prison for much of the relevant time and the appellant's mother knew nothing of that relationship or indeed of any others. Indeed Mr Howard referred me to the determination in **LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC)** where that paragraph stated that lesbianism is not criminalised, there were no records of any murders with a homophobic element and that "corrective rape" was rare and did not represent a general risk. There was a "gay scene" within limitation. The Tribunal had gone on to say "applying **HJ and HT**, there is no general risk to gays or lesbians".

26. Mr Howard also stated that the Tribunal had not considered the area to which the appellant would be returning. The reality is however that there is absolutely nothing to indicate this appellant would suffer persecution for her political beliefs or indeed for the lack of political beliefs. It has never been argued that that is the case nor of course was it raised in the grounds of appeal.

27. The Tribunal properly considered all relevant factors including the appellant's crime, the various reports relating to her sentencing and release, her relationships with her family and her claimed sexual orientation against the public interest in the deportation of someone who had committed a serious criminal offence. They concluded that removal of the appellant was not disproportionate and that the exceptions in Section 33 were not met. While they did not apply the structured approach set out in the judgment in **MF (Nigeria) {2013] EWCA 1192** the reality is that they reached conclusions which were properly open to them on the facts before them. There is no material error of law in their determination.

28. Accordingly their decision dismissing this appeal on immigration and human rights grounds shall stand.

Signed Date

Upper Tribunal Judge McGeachy