Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07297/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 February 2019	**On 20 March 2019**

Before

THE HONOURABLE MR JUSTICE WAKSMAN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE SMITH

Between

[W M]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss J Bond, Counsel instructed by Freemans Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

This is a challenge to deportation. Mr [M], the putative deportee, and the appellant, is a Zimbabwean national aged 38. The decision to deport arises from an offending history which included driving while disqualified with a period of imprisonment of eight weeks in 2009, but then a twelve months sentence of imprisonment more recently imposed in June of 2016 in respect of the offence of making financial gain from making false representations. The decision to deport was made on 11 August 2016. There was then an asylum claim which was refused on 19 July 2017.

The decision of the First-tier Tribunal under challenge before us was made on 14 November 2018. It is right at this stage for us to say a little bit about that

decision. This all concerns Mr [M]'s partner, Ms [N]. The position is that he first met her in 2009. At paragraph 93 the judge said that he accepted that the appellant is in a genuine and subsisting relationship. The relationship may have started as long ago as 2009, but they lived apart for many years. There was a further period of separation when Mr [M] was in prison. We accept that they have now been living together since mid-2017, a period of eighteen months, and notwithstanding what Miss Bond says, it seems to us that that is a perfectly appropriate finding to make so that the actual period of cohabitation as partners is no more than eighteen months.

The judge then comes back to that saying that if this had been a non-deportation case then the individuals would have to have shown they had been living together for a period of two years; but here, on the appellant's own evidence, he had only been living with Ms [N] since his release from detention and that was only eighteen months. That finding, at paragraph 98 of the judgment, was the sole basis on which permission to bring this appeal was granted by the judge on 10 December 2018. It seems to us that what the judge was doing was in fact taking that particular test to use as an equivalent approach to see whether the person was a partner for the purpose of Section 117C exception (2) or not. There is no direct authority on the point.

Miss Bond makes the submission that it has to be more flexible than that because otherwise how does one apply Article 8 in those exceptional cases outside the Rules. We do not think there is much force in that contention because, of course, what the Tribunal has to do is to apply the Article 8 considerations as they now appear in the Act, in particular in Sections 117B to 117D. Here, of course, there is not only the provision of the two exceptions as reflected in 398 to 399A, but then the Article 8 "safety valve" (if we can describe it thus), being the showing of very compelling circumstances over and above exceptions (1) and (2). Therefore we think that on a fair reading, what the judge was doing in paragraph 98 was saying that in fact the relationship, although it may be genuine and subsisting, was not long enough to qualify the putative partner of Mr [M] as a partner for the purpose of exception (2). On that basis there is no error of law; however, we also are of the firm view that even if that is an error of law, it is not a material one for the following reasons.

As we think Miss Bond was bound to accept, not that these matters formed much, if any, of the grounds of appeal, and certainly did not form any part of the permission to appeal, the only route to get home, as it were, on the deportation appeal is either to show that exception (2) is made out or, if not, to show that there are very compelling circumstances. So far as exception (2) is concerned, the difficulty is that while it can be found that as a former Zimbabwean refugee it would be unduly harsh for the partner to return to Zimbabwe, it is in our view quite impossible to see how it could be made out that it would be unduly harsh for her to stay in the UK. She has British citizenship, holding down, as we understand it, a full-time job as a pharmacist. The judge has found that she is part of a large family here which she supports and gains support from. In addition to that, it is actually worth noting, although he says it briefly at paragraph 37, that he records the submission that it would not be unduly harsh for her to remain in the United Kingdom, so he had that

point firmly on board. One also has to take into account that this is a relatively short-term relationship of eighteen months. One knows from cases such as **KO** (see in particular paragraphs 33 to 36 of the decision of the Supreme Court) that it is a sad but inevitable fact of the breakup of any relationship that there are going to be difficult consequences for both partners, but if exception (2) is not made out, and it cannot possibly be here, the only route is very compelling circumstances. The fact that there will be a breakup of the relationship by itself goes nowhere near to satisfying that criterion. The words of the Act are that they must be very compelling circumstances over and above the factors concerned with exceptions (1) and (2). There is nothing in the decision here and in the findings, or indeed in the submissions made by Miss Bond which can approach satisfying that threshold which has been described in other cases as requiring a "very strong case indeed". Miss Bond's only point here (and it is not strictly a ground of appeal as it seems to us), is that the partner is a Zimbabwean refugee, but it is very hard to see how that fact by itself can be sufficient to constitute very compelling circumstances.

Miss Bond makes the final point that the judge did not have to deal with matters in that way because the judge had ruled Ms [N] out as a relevant partner to begin with. Well, we see that, but there are ample findings here to make it plain that neither exception (2) nor very compelling circumstances would have the remotest prospect of being made out. That being so, even if there was an error of law, it is not material.

Notice of Decision

We are satisfied that there is no material error of law in the decision of First-tier Tribunal Judge Wyman promulgated on 14 November 2018. We therefore uphold that decision with the consequence that the appellant's appeal remains dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 1 March 2019

Mr Justice Waksman

Upper Tribunal Judge Smith