Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06280/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision Promulgated**
On 7 January 2020	**On 14 January 2020**

Before

Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

MT
[Anonymity direction made]

Claimant

Representation:
For the appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the claimant: Mr P Turner, Imperium Chambers

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant(s).

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Swinnerton promulgated 7.10.19, allowing the claimant's appeal on human rights grounds only against the decision of the Secretary of State, dated 17.6.19, to refuse his claim for international protection made on 5.10.15, based on a fear of persecution on return to Zimbabwe because of imputed political opinion.

2. First-tier Tribunal Judge Saffer granted permission to appeal on 25.10.19.

3. I note that there has been no cross appeal in relation to the dismissal of the protection claim on Convention or humanitarian protection grounds, nor in relation to any of negative findings in respect of the factual claim.

Error of Law

4. For the reasons set out below, I found such error of law in the making of the decision of the First-tier Tribunal as to require it to be set aside and remade by dismissing the appeal.

Relevant Background and Chronology

5. The claimant arrived in the UK in August 2003 on a visit visa, then just 8 years of age. He was subsequently granted various periods of leave through to 2015. However, on 22.11.13, he was sentenced to a term of three years' detention in a Young Offenders Institution for the very serious criminal offence of possession and use of a prohibited weapon, namely a handgun. In consequence, in 2014 he was made the subject of a deportation decision and deportation order. His subsequent appeal to the First-tier Tribunal was dismissed and he became appeal rights exhausted (ARE) in August 2015.

6. In October 2015 he claimed international protection, asserting a fear that on return he would be targeted by ZANU-PF because he had been publicly critical of ZANU-PF's human rights abuses, lobbying high-profile figures, attending anti-ZANU-PF demonstrations, publishing his criticisms online and in print.

7. The original decision of the respondent, refusing his asylum claim, dated 4.4.16, was withdrawn for reconsideration of his claim as an application for revocation of the deportation order. In the meantime, the claimant made further submissions, all of which were taken into account in the final decision of the respondent issued on 15.8.18. It is this decision which is the subject matter of the present appeal. Whilst the respondent accepted that there was a reasonable degree of likelihood that the claimant had both demonstrated and written critically against ZANU-PF and the Mugabe regime, it did not accept that he met the definition of being a 'clear high profile' individual who would be at risk on return. In any event, the respondent certified the protection claim under s72 of the 2002 Act.

8. At [32] of the impugned decision, Judge Swinnerton found, for the reasons given, that the claimant had rebutted the presumption under s72 that he is a danger to the community of the UK, given that he had not reoffended in the five years since his release, accepting the evidence that he had worked hard to rehabilitate himself.

9. The judge then went on to substantively assess the asylum claim, concluding at [39] that the claimant had not established the general

credibility of his claim, and at [40] he would not reasonably be likely to engage in any anti-ZANU-PF political activity on return to Zimbabwe. At [41] the judge found that the claimant failed to demonstrate a well-founded fear of persecution on return and thus did not qualify for asylum. Similarly, at [42] and [43] the judge rejected the humanitarian protection claim and concluded there was no reasonable likelihood that the claimant would be at risk of serious harm from ZANU-PF, the police, or the government and authorities on return to Zimbabwe.

10. The judge also concluded at [45] that removing the claimant from the UK would not breach his article 8 ECHR rights to respect for private and family life, applying paragraph 399 and 399A test of undue harshness (although referring to the paragraph numbers incorrectly). However, at [51] to [53] of the decision, the judge concluded that in all the circumstances, including the delay in dealing with his claim, and the matters specifically set out in paragraphs [51] to [53], the public interest in the claimant's deportation had "reduced such that deportation in the particular circumstances of this case would be disproportionate and there are very compelling circumstances why he should not be deported."

11. The grounds assert that the judge made a material misdirection in the approach to dealing with a second appeal on the same facts and the application of the Devaseelan (Second Appeals - ECHR - Extra-territorial Effect) Sri Lanka [2002] UKAIT 00702 principles. It is pointed out that in 2015 the First-tier Tribunal found no very compelling circumstances to justify allowing the claimant to remain in the UK. Judge Swinnerton had not reasoned any changes since 2015 that merit overturning the appeal on essentially the same factual matrix. It is further submitted that the reasoning provided, essentially contained in a few lines of generalised statement, is entirely inadequate.

12. In granting permission to appeal on all grounds, Judge Saffer considered it "arguable, given the previous adverse asylum and deportation decision, the fresh adverse findings made in relation to the asylum and human rights claim, and the public interest in removing foreign criminals, that the judge has materially erred in relation to the decision in the case for the reasons set out in the grounds."

13. I accept and agree with the submission that the approach of the First-tier Tribunal was in error of law. As a foreign criminal, the starting point is that there is a strong public interest in his deportation. The more serious the offence, here possession of a handgun, the greater that public interest. The judge's suggestion that the public interest has somehow "reduced" is a fundamental misunderstanding of law and principle which undermines any confidence that the balancing exercise has been adequately performed. Although personal considerations may ultimately outweigh the public interest in any particular case, a claimant's personal circumstances cannot diminish the public interest in his deportation.

14. Further, having found that the claimant was unable to meet any of the tests under paragraph 399 and 399A of the Immigration Rules, the conclusion in a relatively short section at the very end of the decision that there are very compelling circumstances over and above the already high threshold of undue harshness is patently inadequately reasoned. No one reading this part, or indeed the entire decision, would be able to understand why it is the circumstances are said to be very compelling so as to outweigh the significant public interest in the claimant's removal from the UK.

15. I accept that it was not necessary for the judge to set out findings in respect of every factor relevant to an assessment as to whether there are very compelling circumstances. In Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC), the Upper Tribunal stated that, "It is generally unnecessary and unhelpful for First-tier Tribunal judgements to rehearse every detail or issue raised in a case. This leads to judgements becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."

16. Similarly, in Brent LBC v Tudor [2013] EWCA Civ 157, Beatson LJ stated, "It is… clearly established, see eg Knight v Clifton [1971] Ch 700 at 721 and Eagil Trust Co Ltd v Pigott-Brown [1985] 3AER 119 Ast 122 that *there is no duty on a judge when giving his reasons to deal with every submission presented by counsel*. What is important is for the parties to know why one has lost and the other has won. In English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 at [19] this court stated that this requirement:

> "… does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained."" (emphasis added).

17. The reasoning in the impugned decision does not adequately explain or justify how and why the claimant's circumstances are very compelling.

18. I also find that the judge placed too great a reliance on the significance of rehabilitation, historical evidence of past mental health issues, and the unexplained delay in making the decision. At best the rehabilitation is but a neutral factor and no positive credit can be derived from the absence of further offending, merely doing what is required of any person, to abide by the law of the land. In Taylor v Home Secretary [2015] EWCA Civ 845, the Court of Appeal stated that whilst it would not want to diminish the importance of rehabilitation, "the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare."

19. Whilst Mr Turner took me at some length through the decision, as well as relying on positive findings from the previous tribunal decision, including

that the claimant was not involved in gang culture, I am driven to the clear conclusion that whether individually or cumulatively none of the factors relied on can properly amount to very compelling circumstances on the facts of this case.

20. I note that at [41] of the impugned decision, after referring to the claimant's age, fitness and health, in assessing the socio-economic conditions he would face on return to Zimbabwe, Judge Swinnerton noted that the findings of the previous tribunal in this regard, including the likelihood of practical and financial assistance from family either in Zimbabwe or South Africa, and from his supportive mother in the UK, before stating, "there is no convincing evidence before me, (that) the appellant's situation has changed since them so as to contradict the Tribunal's finding that in his case, socio-economic factors did not constitute very compelling circumstances. I do not find it unreasonable to expect the appellant to return to Zimbabwe. He has not demonstrated a well-founded fear of persecution and does not qualify for asylum status." Effectively, the judge was there endorsing the findings of the previous tribunal that there were no very compelling circumstances on the facts of this case, which makes the conclusion to the contrary at the end of the decision rather puzzling.

21. Reading the decision as a whole, there are so many negative findings made about the claimant and/or endorsing or upholding the findings in the previous decision of the Tribunal that it is rather difficult and in my view, impossible, to understand on what basis Judge Swinnerton could reach the conclusion from [51] onwards that, despite all previously stated, there were very compelling circumstances within the meaning of paragraph 398 of the Rules to justify permitting the claimant to remain. Several of the findings appear in fact to be in direct contradiction with the final conclusions allowing the appeal.

22. Looking at [51] to [53] of the decision, I find that the reasons given by the First-tier Tribunal in support of the conclusion of very compelling circumstances are woefully inadequate and insufficient to sustain the conclusion reached. The judge relied on the claimant's youth on arrival in the UK and when committing the index offence, as well as the fact that he had not reoffended but to the contrary shown remorse and rehabilitated himself. It would appear that primarily, the judge relied on the close-knit family relationship with mother, stepfather, sibling and cousin, described by the previous Tribunal as close family ties. The judge was impressed by the emotional support he provided to his cousin, so that his removal would be distressing for each of them. The judge also considered that he had especially strong social and cultural ties to the UK. However, none of these factors can demonstrate very compelling circumstances over and above the 'unduly harsh' threshold in paragraphs 399 and 399A of the Immigration Rules.

23. In all the circumstances, it is clear that in an otherwise careful and competent decision of the First-tier Tribunal, the final assessment of very

compelling circumstances is unsupportable and discloses a material error of law requiring the decision to be set aside and remade.

Remaking of the Decision

24. In the absence of any cross-appeal against the other findings and conclusions of the First-tier Tribunal, the findings of the First-tier Tribunal in relation to asylum, humanitarian protection, article 8 ECHR private and family life, and article 3 ECHR in relation to the claimant's mental health issues must all stand as made, that is to say, dismissed for the reasons given in the decision.

25. In setting aside the decision of the First-tier Tribunal, I specifically preserved all findings other than those in the section of the decision addressing and headed 'Very Compelling Circumstances.' It is not necessary to rehearse those findings or reasons here, except as necessary to the remaking of the decision, as set out below.

26. The sole issue in remaking the decision is confined to whether there are very compelling circumstances over and above the circumstances described in paragraphs 398 to 399A:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
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> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
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> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
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> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
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> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
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> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
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> (i) the child is a British Citizen; or
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> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

27. However, it is clear for the unchallenged reasons given in both previous First-tier Tribunal decisions the claimant cannot meet the 'unduly harsh' threshold or the 'very significant obstacles to integration' tests of paragraphs 399 and 399A. It follows that it is only where there are very compelling circumstances over and above those described in paragraphs 399 and 399A that the claimant can succeed in defeating deportation on human rights grounds.

28. I pointed Mr Turner to the directions issued by the Upper Tribunal on the grant of permission to appeal, notably the presumption at [4] "that in the event of the Tribunal deciding that the decision of the First-tier Tribunal is to be set aside as erroneous in law, the remaking of the decision will take place at the same hearing. "The fresh decision will normally be based on the evidence before the FtT and any further evidence admitted (see [5] below), together with the parties' arguments. The parties must be prepared accordingly in every case." [5] notes that the Tribunal is empowered to permit new or further evidence to be admitted in the remaking of the decision, but where this is sought the parties must comply with Rule 15(2A) of the Upper Tribunal's Procedure Rules. No such Rule 15(2A) application had been made, either within the timetable set out in the directions, or at all. In any event, no application was made by Mr Turner to adduce further evidence, documentary or oral, even though the claimant was in attendance at the hearing, and no adjournment to do so was sought.

29. Mr McVeety had no further submissions to make, relying on those made earlier in asserting and error of law. I advised Mr Turner that it was not necessary for him to repeat his earlier submissions in relation to the challenge to the very compelling circumstances finding of the First-tier

Tribunal, but invited him to make any further submissions he wished on the remaking of the decision, which he proceeded to do. I have made a careful note of both his earlier and later submissions, which perhaps necessarily involved some repetition, and have addressed the relevant matters in my considerations set out below.

30. Mr Turner invited me to carefully consider the large bundle of materials relied on by the appellant before the First-tier Tribunal, which I have examined and taken into account before reaching any findings of fact.

31. It is clear that there are a significant number of positive factors, to the claimant's credit, which Mr Turner submitted were highly relevant to the issue of very compelling circumstances. Whilst I have taken all of those into account in the remaking of the decision, several are of limited relevance to the crucial issue.

32. It may be helpful to set out in summary form the principle factors relied on by the claimant in addition to those matters already referenced above:

    (a) That he came to the UK from Zimbabwe at the young age of 8, a child, and has effectively been raised here. The judge concluded that he had especially strong social and cultural ties to the UK, where he has been educated, has friends, and where his immediate family members reside;

    (b) The decision of the previous First-tier Tribunal Judge found no evidence of gang-related activity by the claimant;

    (c) The positive features found by that judge were and remain a starting point for consideration today. Those included the extent of his private and family life in the UK;

    (d) Judge Swinnerton also found that the claimant had rebutted the presumption that he is a danger to the community;

    (e) There was no suggestion of gang affiliation or membership and when sentenced by the Crown Court had been of hitherto good character. Neither had he reoffended, but had been living a blameless life in the community for over 5 years;

    (f) Since his release, he had thrown himself into voluntary charitable work, including the responsible position of becoming the governor of a NHS Trust, a position of trust, and thereby demonstrating his contribution to society;

    (g) At [48] Judge Swinnerton found that the claimant had been convicted of a 'one-off' crime and has shown a good family and academic background;

    (h) The judge also accepted that he has shown remorse and rehabilitation;

    (i) Since release he represents no risk to the public;

    (j) He has some mental health issues, including depression and anxiety;

(k) His educational qualifications are also to his credit;

(l) He has a degree of family life in the sense that he lives with his mother, step-father, sibling, and cousin, which Judge Swinnerton described as a close-knit household;

(m) He has a particularly close relationship with his cousin who relies on him for advice and emotional support. If removed from the UK, the experience would be distressing to each of them;

(n) Whilst he was charged with affray and prosecuted, he was acquitted of the allegation;

(o) His asylum claim had been pending since January 2016. Judge Swinnerton accepted that this delay had adversely affected the claimant's mental health, increasing his depression and anxiety.

33. There are a number of factors that are either neutral or weigh against the claimant:

(a) Judge Swinnerton accepted, as do I, that the claimant has committed a serious crime and is a foreign criminal. Given the serious nature of the crime, the public interest in his removal from the UK is high;

(b) His immigration status has always been precarious so that pursuant to section 117B of the Nationality, Immigration and Asylum Act 2002 little weight is to be given to a private life developed in the UK;

(c) Whilst he is not financially independent, as he is supported by his mother, he is independent of support by the state. However, this is a neutral factor;

(d) That he speaks English is also a neutral factor;

(e) He has lived in the UK most of his life so that at [48] of the decision Judge Swinnerton found that he is socially and culturally integrated in the UK, despite his criminal conviction and sentence;

(f) He has a girlfriend but has never lived with her, so that he has no family life with a partner within the meaning of the Immigration Rules;

(g) He has no children and thus no family life with a child to consider. Whilst he has a close relationship with other family members, he is not a primary carer for any of them;

(h) He has no well-founded fear of persecution and would not face a real risk of serious harm on return to Zimbabwe. At [43] of the decision Judge Swinnerton found that there was no reasonable likelihood that the claimant would be at risk of serious harm from ZANU-PF, the police, or the government and authorities on return to Zimbabwe. It had also been conceded on his behalf that his removal would not breach article 3 ECHR on the basis of any medical issue. These are all relevant considerations in the assessment of whether there are very compelling circumstances on the facts of this case;

(i) His mental health issues are insufficient to reach the article 3 threshold. At [51] the Judge was not satisfied that he has any serious

mental health condition and/or any physical illness for which he would not be able to obtain suitable treatment in Zimbabwe. It follows that his mental and physical health is not relevant to the issue of very compelling circumstances;

(j) He is otherwise fit and able-bodied, able to work to support himself. As Judge Swinnerton also noted, the previous First-tier Tribunal decision found the claimant to be a fit young man of sound health. Judge Swinnerton was not satisfied that the claimant's health had deteriorated materially since that previous finding;

(k) Judge Swinnerton found no reason to depart from the finding that the claimant would likely have practical and financial support from family in Zimababwe or South Africa, as well as a supportive mother in the UK, so that Judge Swinnerton found that at [48] of the decision no sufficient reason in the further evidence or submissions to depart from the previous findings of the Tribunal that there were no very significant obstacles to his integration in Zimbabwe;

(l) It is significant that at [41] of the decision Judge Swinnerton also found no reasons in the further evidence to contradict the previous tribunal's finding that the claimant's socio-economic circumstances did not constitute very compelling circumstances. It appears that the judge correctly relied on Devaseelan (Second Appeals - ECHR - Extra-territorial Effect) Sri Lanka [2002] UKAIT 00702 principles to take the previous findings as the starting point, but after considering the new evidence found no justification to depart from those findings;

34. I confirm that I have taken all the above matters fully into account, both those for and against the claimant. However, in the light of the comprehensive findings of Judge Swinnerton, this Tribunal must proceed on the basis that the claimant will on return be relatively young, fit and healthy, and able to integrate in Zimbabwe, and will likely have family practical and financial support in doing so. At [41] of the decision, nothing in relation to the circumstances of the claimant's return to Zimbabwe were found by Judge Swinnerton to amount to very compelling circumstances, the judge entirely agreeing with the findings of the previous tribunal in this regard, and at [44] the judge also found that he had not provided any grounds "which would warrant a grant of discretionary leave" outside the Rules.

35. Many of the factors relied on in Mr Turner's submissions may well be to the claimant's general credit, but the submissions demonstrated a misunderstanding of what can amount to very compelling circumstances in relation to a person subject to deportation. The claimant's removal from the UK is conducive to the public good and in the public interest. Given that his sentence was over 12 months but under 4 years, both previous decisions of the First-tier Tribunal very properly gave consideration to paragraphs 399 in relation to family life and 399A in relation to private life. As explained above, and is not challenged, the claimant cannot meet any of the requirements in 399 or 399A, so that it is only where there are very

compelling circumstances over and above those under 399 and 399A that the public interest in the claimant's deportation can be outweighed.

36. However, the factors relied on by Mr Turner cannot even begin to demonstrate any very compelling circumstances over and above those under paragraphs 399 and 399A of the Immigration Rules. For example, as explained above, little weight can be given to the fact that the claimant has worked hard to rehabilitate himself. The fact that he has not reoffended means only that he has done what was expected of any person living in the UK. To live a law-abiding life and to contribute to society and cannot be in any sense of the words be described as 'very compelling'. Whilst there is a degree of family life with mother, stepfather, sister and cousin, even Judge Swinnerton concluded at [45] that interference to those relationships by the claimant's removal would not infringe article 8 ECHR. Having considered the new evidence, at [47] Judge Swinnerton also agreed with the assessment of the previous judge and found no reason to depart from the conclusion that the claimant could not meet the high 'unduly harsh' threshold test in paragraph 399 in respect of family life with a child or partner. At [48] the judge also agreed with the previous finding that nothing in the claimant's private life circumstances demonstrated very significant obstacles to his integration in Zimbabwe. It follows that it is difficult to see anything in the personal, private and family life of the claimant which could amount to very compelling circumstances. If the claimant cannot even bring himself within article 8 ECHR on the R (Razgar) v Secretary of State for the Home Department [2004] UKHKL 27 stepped approach, and cannot bring himself within the circumstances described under paragraphs 399 and 399A, it is necessarily difficult to see what could, even taken at the highest, could amount to very compelling circumstances. Taking in the round full account of all factors arising from the oral and documentary evidence, whether or not specifically identified above, I find that there are in fact no very compelling circumstances on the facts of this case sufficient to outweigh the significant public interest in the claimant's deportation.

37. It follows that the appeal cannot succeed and must be dismissed on all grounds.

Decision

38. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on all grounds.

Signed

Upper Tribunal Judge Pickup

Dated 8 January 2020