IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000060

First-tier Tribunal No: PA/55060/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd February 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ESM
(Anonymity Order made)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: In Person

Heard at Field House on 19 February 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing ESM's appeal against the respondent's decision to refuse her human rights claim further to a decision to deport her under section 32(5) of the UK Borders Act 2007.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and ESM as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Zimbabwe, born on 4 August 1977. She entered the UK in 1999 using her own passport. On 6 December 2005 she claimed asylum but her claim was refused on non-compliance grounds owing to her failure to attend an asylum interview. On 1 April 2009, she was convicted of two counts of dishonesty and making false representations to make gain for self or another or to cause loss to another or expose another to risk, and one count of obtaining services dishonestly. On 29 April 2009 she was sentenced to two years and six months' imprisonment. On 18 June 2010 she was detained by the UKBA and she made another asylum claim on 25 June 2010. She was granted bail on 25 October 2010. On 26 November 2012 her asylum claim was refused and she was served with a decision to deport letter and a Deportation Order on the same day. She appealed against the decision, unsuccessfully, and became appeal rights exhausted on 23 June 2014.

4. On 28 June 2013, whilst her appeal was ongoing, the appellant applied for leave to remain on family and private life grounds, but her application was refused on 13 August 2013.

5. On 25 March 2020 an enquiry was made on the appellant's behalf by her legal representatives, referring to her being treated by the Home Office as a French national and therefore not being permitted to claim asylum as a result, whereas case minutes disclosed as a result of a subject access request showed that it was confirmed that she was a Zimbabwean national and not French, and confirmation was sought that she was able to make a claim for asylum as a Zimbabwean national. The appellant then completed a preliminary information questionnaire on 20 June 2020 claiming that she was at risk on return to Zimbabwe and that she had no family remaining there as they had all been killed.

6. On 25 February 2021 the appellant's partner, [CAN], applied for leave to remain on family and private life grounds with the appellant as his dependant, and they were both granted leave to remain until 19 January 2024, despite the appellant still being the subject of a Deportation Order.

7. According to the respondent's decision letter, the appellant made further submissions on 13 November 2020 and 9 August 2021. The respondent treated the submissions as an application to revoke the Deportation Order previously made against the appellant and as a fresh asylum and human rights claim.

8. In a decision dated 31 October 2022, the respondent refused the appellant's claims and refused to revoke the Deportation Order. The respondent noted that the appellant was claiming to have a fear of return to Zimbabwe, that she had no one to return to in Zimbabwe, that she was suffering from depression, anxiety and pneumonia and that all her family lived in the UK. With regard to the appellant's family life and paragraphs 399(a) and (b) of the immigration rules, the respondent noted that she had three children, HA born on 3 November 2012, SA born on 20 October 2015 and LB born on 6 June 2018, all of whom were Nigerian citizens with leave to remain n in the UK until 19 January 2024. The respondent accepted that the appellant had a genuine and subsisting parental relationship with her children but did not accept that it would be unduly harsh for them to relocate to Zimbabwe with her or for them to remain living in the UK without her. The respondent did not accept that the appellant had a genuine and subsisting relationship with her partner but considered in any event that it would not be unduly harsh for him to remain in the UK without her. As for the appellant's private life and paragraph 399A, the respondent did not accept that the appellant had been lawfully resident in the UK for most of her life, did not accept that she was socially and culturally integrated in the UK and did not accept that there were

very significant obstacles to her integration in Zimbabwe. The respondent did not accept that the appellant was at risk on return to Zimbabwe. The respondent considered that the appellant had been granted leave in line with her partner in error given that she was the subject of a Deportation Order, and her leave was therefore to be cancelled. It was not accepted that there were very compelling circumstances outweighing the appellant's deportation and it was therefore not accepted that her deportation would breach her Article 8 rights. The respondent considered further that the appellant's deportation would not breach her Article 3 rights on medical grounds. The respondent concluded that the appellant's deportation remained conducive to the public good.

9. The appellant appealed against that decision and her appeal was heard on 26 October 2023 by First-tier Tribunal Judge Joshi who allowed the appeal in a decision promulgated on 27 November 2023. The appeal proceeded largely on Article 8 grounds with the judge noting that the appellant's asylum claim was the same as that considered previously and finding that she had not demonstrated that she was at risk on return to Zimbabwe. As for the Article 8 claim, the judge noted the appellant's claim to have left Zimbabwe at the age of 7 years when she moved to France with her parents, and to have come to the UK in 1999. The judge noted that the appellant's eldest child was now a British citizen and that the other two children had limited leave to remain in the UK until 2024, and that the children had spent their entire lives in the UK. The judge found that the private life exception to deportation in section 117C(4) of the Nationality, Immigration and Asylum Act 2002 did not apply because the appellant had not been lawfully resident in the UK for most of her life. He found that the family life exception in section 117C(5) did not apply in relation to the appellant's partner and their youngest child because neither was British and the child had not lived in the UK for 7 years. As for the two other children, the judge found that relocation to Zimbabwe would be unduly harsh but that, whilst separation of the appellant from her children would be harsh, it would not be unduly harsh, given the lack of evidence to show that it would be. The judge found that there were nevertheless very compelling circumstances outweighing the public interest in the appellant's deportation and he allowed the appeal on human rights grounds, on that basis.

10. The respondent sought permission to appeal against that decision on the grounds that the judge had given inadequate reasons for concluding that the appellant met the 'very compelling circumstances' test.

11. Permission was granted in the First-tier Tribunal on 3 January 2024, on the following basis:

> "Whilst the Judge finds that the appellant's recent offending is a factor which 'strongly goes against the appellant', it is arguable that the Judge has afforded more weight to the appellant's family and private and family life, notwithstanding the fact that her status has always been precarious and for the most part without leave. It is arguable that the Judge gives insufficient reasons as to why they determine that the appellant's private and family life outweighs the significant public interest in her removal."

12. There was no rule 24 response from the appellant.

13. The matter came before me on 19 February 2024. The appellant appeared in person, without her legal representatives who had advised the Tribunal, in a letter dated 16 February 20204, that they would not be attending the hearing. They stated in their letter that they did not have full instructions or funding to attend, but they made brief submissions to the effect that the judge was entitled to find that there

were very compelling circumstances and to allow the appeal on the basis that she did. Ms Isherwood, in response, made submissions before me and I address those below.

Discussion

14. The respondent's case is essentially that the judge, having found that the exceptions tod deportation in section 117C(4) and (5) had not been met, failed to explain what was so compelling about the appellant's circumstances to enable him to allow the appeal. More specifically, it is asserted in the grounds of appeal that the judge failed to give adequate weight to the public interest by minimising the appellant's criminal history; that the judge failed to consider the relevant facets of the public interest namely the risk of re-offending, the need for deterrence and the expression of society's revulsion; that the judge failed to take account of the fact that the appellant's family and private life was established without any lawful leave; and that the judge erred by giving weight to the respondent's delay in taking deportation action against the appellant. Ms Isherwood focussed on the latter issue in particular, submitting that the only justification the judge gave in his decision for finding the appellant's circumstances to be very compelling was the respondent's delay.

15. As a starting point, there was no challenge to the general principle that the 'very compelling circumstances' test could be met in a case where neither exception to deportation had been made out. Indeed that principle was made clear at [60] of HA (Iraq) v Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1176 and [4] of HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22, with reference to NA (Pakistan) v Secretary of State for the Home Department & Ors [2016] EWCA Civ 662. The question is, therefore, whether the judge properly identified factors which entitled him to conclude that the 'very compelling circumstances' test was met in this case, having found neither exception to deportation to be made out.

16. We disagree with Ms Isherwood that the only factor relied upon by the judge was the delay by the respondent in seeking to deport the appellant, as mentioned at [59]. On the contrary, having directed himself at [54] to the guidance in HA (Iraq), and having set out the factors weighing against the appellant following the relevant 'balance sheet' approach at [55] to [57], the judge went on at [58] and [59] to identify various factors which he considered cumulatively to outweigh the public interest in deportation in addition to the delay. Those factors were the fact that the appellant had been living in the UK for 24 years since 1999; that she had developed a strong private and family life during that time which included her 10 year relationship with her partner and her three children from whom separation would be harsh, albeit not unduly harsh; that she had an adult child from a different relationship who was a British citizen; and that she had left Zimbabwe when she was a child and had not lived in Zimbabwe for more than 30 years. As for the issue of the delay itself, I do not agree with the respondent that the judge erred by taking that into account, when it was clearly only one of many factors he considered.

17. Neither do I agree that the judge minimised the appellant's criminal history and failed to consider other relevant facets of the public interest. The grounds, at [3], refer to the PNC record showing that the appellant had accumulated 34 fraud and 7 theft offences from 2002 to 2009, but the judge was clearly fully aware of, and took into account, the appellant's offending history. He noted at [56] that the Deportation Order resulted from the convictions in 2009 and that the appellant had committed 3 further offences since then, considering in detail at [57] the nature of those offences and the explanation provided by the appellant for having committed them. He gave appropriate weight to the fact that the appellant returned to criminality when she had

struggled financially. The grounds refer to the offences as being “serious crimes involving large sums of money” but do not explain how and where that was reflected in the evidence before the judge and certainly the PNC record does not support that. As for the assertion in the grounds that the judge failed to have regard to the risk of re-offending, it is the case that the judge did not make any specific finding in that regard. However there does not seem to have been an OASys or other report relied on by the respondent setting out concerns about risk and in any event the judge effectively addressed that matter at [57]. The question of deterrence was clearly considered by the judge at [55]. The grounds assert that the judge failed to take account of the fact that the appellant’s family and private life was established without any lawful leave, but that was a matter to which the judge referred at [21] when setting out the respondent’s case and he clearly took that into account at [45] and [46].

18. For all these reasons I do not consider there to be any merit in the respondent’s challenge to Judge Joshi’s decision. It seems to me that the grounds are essentially a disagreement with the judge’s decision. The judge took account of all the evidence and properly applied the relevant legal provisions. He gave reasons for his findings and conclusions and was perfectly entitled to conclude as he did. I find no errors of law in his decision.

Notice of Decision

19. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The Secretary of State’s appeal is therefore dismissed. The decision to allow ESM’s appeal therefore stands.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 February 2024