Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001684
(HU/50315/2021); IA/01028/2021

THE IMMIGRATION ACTS

Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 16th August 2022	**On 27th February 2023**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WELLINGTON MPAKATI

Respondent

Representation:
For the Appellant: Mr C Williams, Senior Home Office Presenting Officer
For the Respondent: Mr M Ahmed, Counsel instructed by CB Solicitors

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Wellington Mpakati. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Mpakati as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Zimbabwe. He arrived in the United Kingdom on 25th December 1998 with leave to enter until 25th June 1999. He was granted further leave to remain until 31st August 2000 and has remained in the UK unlawfully since that expired.

3. Between 13th August 2002 and 14th March 2013 the appellant accrued 14 convictions for 32 offences which include theft, handing stolen goods, obtaining property by deception, driving whilst disqualified, breach of a community service order and possession of a false/improperly obtained identity document. On 4th December 2008 following an unsuccessful appeal, a Deportation Order was signed against the appellant. The appellant has made several unsuccessful attempts to have that deportation order revoked. In 2012, an appeal against the respondent's decision of 21st May 2012 to refuse to revoke the deportation order was dismissed by the First-tier Tribunal. That was followed by an asylum claim made by the appellant in December 2013 that he subsequently withdrew, and further submissions made by the appellant in December 2016 that were refused by the respondent on 24th July 2017.

4. On 9th July 2019, a temporary travel document was secured, but during an interview on 30th August 2019, the appellant claimed that his partner had given birth to their third child on 15th August 2018. The respondent considered further representations made by the appellant on 11th October 2019 and 2nd December 2020, and on 15th December 2020, the respondent made a decision to refuse the appellant's human rights claim. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Mills for reasons set out in his decision promulgated on 9 July 2021.

5. The respondent claims the decision of Judge Mills is vitiated by material errors of law. Broadly summarised, the respondent advances three grounds of appeal. First, the respondent claims there is inadequate reasoning for the finding at [72] that the appellant is no longer a persistent offender. The respondent claims the First-tier Tribunal Judges'

were right in 2008 and 2012 to be sceptical about the appellant's claimed change of character, and Judge Mills erred in accepting the appellant's claim. The respondent claims that whilst the appellant may not have committed any offences since 2016, he has continued his dishonesty. Second, the respondent claims that when the correct and higher threshold for a foreign criminal of 'unduly harsh' is applied, the appeal should have been dismissed because the appellant has not established that the effect of the appellant's deportation on his partner and children would be unduly harsh. Third, the respondent claims Judge Mills erred in the weight attached to the respondent's 'delay' in deporting the appellant as a factor that tips the balance in the appellant's favour. On the authorities, the respondent submits she is entitled to proceed on the basis that those unlawfully in the UK will leave of their own accord; she is not obliged to remove an individual or issue a removal decision.

6. Permission to appeal was granted by First-tier Tribunal Judge Komorowski on 9th November 2021. Judge Komorowski said:

> "The complaint set out at paras. 10-11 is arguable. The judge refers (at para. 79) to the dicta in EB (Kosovo) [2008] UKHL 41, [2009] 1 AC 1159 which refers to years passing "without a decision to remove being made". But in this case, a decision (to deport rather than remove) was made in July 2008 (following conviction in April 2008), and was confirmed on appeal twice. It is arguable that the judge has wrongly equated delay of enforcement of a decision with delay in making the decision itself. The error is arguably material particularly where the judge, in declining to make a fee award, referred to the appeal as being finely balanced."

7. The appeal was listed before me to determine whether the decision of First-tier Tribunal Judge Mills is vitiated by a material error of law. I am grateful to the parties representatives for their succinct and focused submissions.

The parties submissions

8. On behalf of the respondent, Mr Williams adopted the respondent's grounds of appeal. He submits Judge Mills erroneously considered the public interest in the appellant's removal to be diminished by what is

described as the respondent's unexplained delay in seeking to enforce the appellant's deportation. He submits Judge Mills refers to the decision of the House of Lords in EB (Kosovo) v SSHD [2008] 3 WLR 178, in which the House of Lord held delay in the decision-making process might be relevant in any one of three ways. Mr Williams refers to paragraphs [15] and [16] of the judgement of Lord Bingham in which he said:

> "15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655* , para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see Boultif v Switzerland (2001) 33 EHRR 1179 , para 48; Mokrani v France (2003) 40 EHRR 123 , para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.
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> 16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of JL (Sierra Leone) , heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to

> be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in *Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947, [2005] INLR 575* , para 25:
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> > "Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal""

9. Mr Williams submits the focus is upon delay by the respondent in reaching a decision whereas here, a deportation order was signed against the appellant on 4th December 2008 and there has been no delay on the part of the respondent in reaching her decisions. The delay is not to the decision making but in enforcement. The appellant has always been aware that the respondent does not consider his presence in the UK to be lawful and any delay in enforcing a decision, does not diminish the weight to be attached to the public interest in the same way. Here, the respondent reached a decision relatively quickly, but the deportation of the appellant could not be enforced initially because of the situation in Zimbabwe in 2008, and thereafter because of the repeated applications that were made by the appellant. Mr Williams submits there was no unreasonable delay on the part of the respondent and there is no evidence that any delay here is the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. There is no authority to support the proposition that where there is delay in enforcing a decision, the weight to be attached to the public interest diminishes.

10. Mr Williams refers to the decision of the Upper Tribunal in RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC) in which the Tribunal held that in cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision-making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR. The respondent was entitled to proceed on the basis that the appellant who was unlawfully in the UK, would leave of his own accord.

11. Mr Williams submits that at paragraph [91] of his decision, Judge Mills makes it clear that the length of time that the relationship and the appellant's private life ties have been allowed to develop through the respondent's failure to enforce his removal, are such that it is appropriate to attach considerable weight to this relationship in the proportionality balance. He submits that if Judge Mills had not erred as to the relevance of the 'delay' it cannot be said that he would have reached the same decision, in what the judge described to have been a 'finely balanced' appeal.

12. On behalf of the appellant, Mr Ahmed adopted the Rule 24 response dated 26th July 2022. He submits there is no material error of law in the decision of Judge Mills. The issue for the First-tier Tribunal Judge was whether the respondent's decision to refuse the human rights claim would be unlawful under s6 of the Human Rights Act 1989. On the evidence, it was open to the Judge to find the appellant is no longer a 'persistent offender' and therefore the appellant is not a 'foreign criminal' as defined in s117D of the 2002 Act. In the circumstances the public interest considerations applicable in all cases as set out in s117B of the 2002 Act applied, and the judge carried out a careful analysis of whether the respondent's decision is proportionate.

13. Mr Ahmed submits that in MN-T (Columbia) v Secretary of State for the Home Department [2016] EWCA Civ 893, Jackson LJ confirmed that 'lengthy delay' in taking action to deport is capable of making a critical difference, albeit that is an exceptional circumstance. Jackson LJ had considered the lengthy delay in that case had led to the claimant substantially strengthening her family and private life. It had also led to her rehabilitation and to her demonstrating the fact of her rehabilitation by her industrious life over 13 years. At paragraph [41] Jackson LJ set out the obvious reasons why the public interest in the deportation of foreign criminals is in the public interest. He went on to say, at [42], that if the respondent delays deportation for many years, that lessens the weight of these considerations. Mr Ahmed submits that any delay in enforcing

deportation has an impact on the weight to be attached to the public interest in the deportation. He submits Judge Mills properly considered the delay in enforcement as a relevant factor to the assessment of proportionality, and he was entitled to do so. Mr Ahmed submits that reading the decision as a whole, Judge Mills reached a decision that is well reasoned and follows a thorough examination of all relevant factors and evidence. The decision to allow the appeal was one that was open to the Tribunal, and the respondent simply expresses disagreement.

14. In response, Mr Williams referred to the facts in MN-T (Columbia) as set out in paragraphs [6] to [9] of the judgment of Jackson LJ. On 26th July 1999 the claimant had pleaded guilty to supplying one kilogram of cocaine and received a sentence of eight years' imprisonment. The judge recommended that the claimant be deported. She was released on licence in 2003. Some five years later in July 2008 the SSHD notified the claimant of his decision that the claimant's deportation would be conducive to the public good. The claimant appealed against that decision but her appeal was dismissed on 3rd March 2009. The SSHD made no move to deport the claimant. In June 2012 the claimant applied for further leave to remain. The SSHD refused the application and indicated that she would make a deportation order. Mr Williams submits the decision is yet another example of lengthy delays in decision making on the part of the respondent. In contrast, here, the deportation order was made in 2008 but there were no removals at all from the UK to Zimbabwe between 2008 and 2010. After that, there were several applications made by the appellant, each of which had to be decided, and were decided promptly. There was no egregious delay.

Discussion

15. At paragraphs [1] to [13] of his decision, Judge Mills records the background to the appeal and the appellant's immigration history. The appellant's convictions are recorded at paragraph [10]. As recorded in paragraph [34] of the decision, it was accepted by the Presenting Officer

that the appellant is not subject to automatic deportation, and would only be a 'foreign criminal' for the purposes of the rules and s.117C of the 2002 Act, as defined at s.117D(2)(c), if the Tribunal were to find him to be a 'persistent offender'. The Tribunal heard evidence from the appellant and his partner. The Judge's findings and conclusions are set out at paragraphs [61] to [92] of his decision.

16. In reaching his decision, Judge Mills acknowledged, at [61], that the starting point in deciding the appeal are the findings of Judge Obhi in 2012, and Judge Hague in 2008. He noted that in summary, the Tribunals previously found that the appellant's offending justified the conclusion of the respondent that the appellant's deportation was conducive to the public good, that he would face no significant difficulties on return to Zimbabwe, and that his family life with his wife and then two children did not outweigh the public interest in his deportation. At paragraph [62] he referred to the significant passage of time since those decisions, and properly noted that the development of the appellant's family ties, since his previous appeal was heard may well provide a sufficient basis to depart from the conclusion of the previous Tribunal panel.

17. It is useful to begin by considering whether it was open to the Judge to find that the appellant can no longer be regarded as a 'persistent offender', because as Judge Mills properly noted at [63], that informs the relevant public interest considerations that the Tribunal was bound to have regard to in accordance with s117A of the 2002 Act. At paragraphs [64] to [74], Judge Mills considered the evidence before the Tribunal regarding the appellant's convictions and the steps taken by the appellant to rehabilitate and address his offending behaviour. He noted at [65] that whilst the appellant's last conviction was in March 2013, that was for offences committed in May 2011. He noted the last recorded offence for which the appellant was convicted is the October 2011 offences of shoplifting and possession of a Class A drug. He also noted the appellant was again cautioned in January 2016 for shoplifting.

18. Having considered all the evidence in the rounds, Judge Mills said:

> "75. Taking all matters in the round, I have concluded that the fact that the appellant has now gone more than 5 years without offending supports his claim that there has been a fundamental change in his life, such that he no longer poses a significant risk of re-offending, and is not a 'persistent offender'. The consequence of this finding is that the appellant is not a 'foreign criminal' for the purposes of either the immigration rules or the 2002 Act, and the higher thresholds applicable when a foreign criminal relies on their family life to resist their removal from the UK, do not apply in this appeal."

19. I reject the claim made by the respondent that there is inadequate reasoning for the finding at [72] that the appellant has changed and is no longer a persistent offender. It is clear when paragraphs [63] to [74] of the decision are read as a whole, that Judge Mills carefully considered all the relevant evidence before the Tribunal and gives ample reasons for his conclusion that the appellant can no longer be regarded as a 'persistent offender'. At paragraph [71], Judge Mills refers to the evidence of the appellant's partner who was shocked to hear the appellant was cautioned for shoplifting in 2016. At paragraph [72], Judge Mills explains that the evidence of the appellant's wife did in fact cause him to question whether the appellant is rehabilitated. However, he accepted that putting the 2016 caution in context, and weighing it with all the other evidence before the Tribunal including the appellant's engagement with the "Every Step of the Way Service" and the appellant's explanation of events after her received the caution, was sufficient to lead him to conclude the appellant is not a 'persistent offender'.

20. In Chege ('is a persistent offender') [2016] UKUT 00187 (IAC), the appellant had been convicted of a series of offences in the period 1997 to 2013. The offences included driving while disqualified, handling stolen goods, failing to surrender to bail, possession of class A drugs, assault and public order offences. It was submitted that since he had committed no further offences since release from immigration detention in June 2013, he could no longer be regarded as such an offender at the time of the FTT decision in his case in July 2015. On the facts of the case, the

appeal was dismissed. Chege, it was held, was properly to be regarded as a persistent offender.

21. The respondent gains little assistance from the decision of the Court of Appeal in SC (Zimbabwe) v SSHD [2018] EWCA Civ 929. The Court of Appeal interpreted the term "persistent offender" in the Nationality, Immigration and Asylum Act 2002 s.117D(2)(c)(iii). Although McCombe LJ, held that for the reasons given by both Tribunals below, the appellant in that case is a persistent offender, he rejected the submission made by counsel for the SSHD that the status of "persistent offender" once acquired, can never be lost [§ 26].

22. It is clear that a fact sensitive assessment is required. It was in my judgement open to Judge Mills to find that the appellant is not a ‘persistent offender’ for the reasons set out in his decision. The respondent’s grounds in this respect amount to no more than disagreement as to the weight to be given to different factors. The findings and conclusions reached by Judge Mills were neither irrational nor unreasonable in the Wednesbury sense, or findings and conclusions that were wholly unsupported by the evidence.

23. Having found the appellant is no longer to be regarded as a ‘persistent offender’ Judge Mills properly noted the appellant is not a ‘foreign criminal’ for the purposes of either the immigration rules or the 2002 Act, and the higher thresholds applicable when a foreign criminal relies on their family life to resist their removal from the UK, do not apply in this appeal.

24. Judge Mills addressed whether on the facts, there are ‘compelling circumstances’ rendering the appellant’s removal ‘unjustifiably harsh’, and therefore disproportionate under Article 8 of the ECHR. Judge Mills acknowledged that the fact the appellant has committed a large number of crimes in the UK remains of relevance, and significantly increases the public interest in his removal when compared to another person who,

while present in the UK unlawfully, has not been convicted of any criminal offences. He went on to find that the weight to be attached to the pressing public interest in the appellant's removal is significantly reduced by the unexplained delay in seeking to enforce the appellant's deportation. Judge Mills noted no returns to Zimbabwe were taking place when the appellant's first appeal was dismissed in 2008, but the political situation there has much improved in the years since the second appeal in 2012. He said that there was no evidence before the Tribunal of any attempts by the respondent to remove the appellant, until very recently. There is, I accept some considerable force in the submission made by Mr Williams that the deportation of the appellant was not possible, not because of any delay in decision making on the part of the respondent but because of the appellant's own actions. A deportation Order was signed on 4th December 2008. By the time removals to Zimbabwe had been reinstated, the appellant had married and had made a further Article 8 claim. His second appeal was dismissed by a panel chaired by First-tier Tribunal Judge Obhi in August 2012. In December 2012, the appellant claimed asylum, but later withdrew that claim in May 2013. He made further submissions in 2016, that were refused by the respondent in July 2017. A Travel document was secured by the respondent on 9th July 2019 and it was only when the appellant attended a 'Mitigating Circumstances interview' on 30th August 2019 that the appellant referred to the birth of his third child in August 2018. I accept Judge Mills erred in finding, at [78], that the weight to be attached to public interest was significantly reduced by the respondent's entirely unexplained delay in seeking to enforce the appellant's deportation. Although not all, a considerable part of the delay in enforcing the appellant's deportation is explained by his own immigration history. As Lord Carnwath (with whom Lord Kerr, Lord Reed and Lord Hughes agreed) said in Patel v SSHD [2013] UKSC 72:

> "29. … It is to be borne in mind also that exercise of the powers to direct removal, which alone are at issue in the Patel case, is likely to involve both public cost and personal hardship or indignity. The Secretary of State does not "thwart the policy of the Act" if she proceeds in the first

instance on the basis that unlawful overstayers should be allowed to leave of their own volition (as on the evidence the great majority do). The Upper Tribunal observed in the present case, commenting on its concerns at the implications of the decision in Sapkota :

> "For every person whose real claim is one outside the Rules, there are many who merely want a decision in accordance with the Rules and would either voluntarily depart or make a fresh application if that appeal were to be unsuccessful. Further, the developing jurisprudence of the Upper Tribunal has moved beyond the proposition that human rights only arise on removal decisions, to cases where variation of leave applications may need to take into account a wide variety of aspects of private life under article 8 rights, thereby enabling an independent assessment of this claim to remain without the person concerned running the risk of breaking the law." (para 32)

25. I have therefore carefully considered whether that error is material to the outcome of the appeal. At paragraphs [91] and [92], Judge Mills said:

> "91. In this case, given the length of time that the relationship, and the appellant's private life ties, have been allowed to develop through the respondent's failure to enforce his removal, I consider that it is appropriate to attach considerable weight to this relationship in the proportionality balance.
>
> 92. Taking all matters in the round I conclude that the cumulative effect of all of the issues discussed above is sufficient to establish that there are compelling circumstances in this case which mean that the public interest in the appellant's deportation is outweighed by the appellant's right to family and private life, and the deportation order signed in December 2008 ought now to be revoked. This appeal therefore succeeds on Article 8 grounds."

26. Although this was a decision that Judge Mills referred to as "finely balanced" when considering whether he should make a fee award, in my judgement, Judge Mills would have reached the same decision even if he had not had regard to the delay in enforcing the deportation of the appellant. The delay in enforcing deportation is but one factor that was considered by the Judge in his assessment of proportionality. The delay should not have been given the prominence it was by Judge Mills, but equally it was not an entirely irrelevant consideration. In the end, Judge Mills was faced with an appeal by an individual who is no longer to be regarded as a foreign criminal as defined in s117D of the 2002 Act, who has now established deep rooted ties to his wife and children established

over a significant period of time, albeit the appellant was for much of that time the subject of a deportation order.

27. Judge Mills addressed the relevant public interest considerations and acknowledged that the appellant's relationship with his wife was commenced at a time when the appellant was in the UK unlawfully and that, by virtue of S.117B(4) of the 2002 Act, he is required to attach 'little weight' to it. He accepted the same applies to the private life built up by the appellant, by virtue of s.117B(5).

28. At paragraph [83], Judge Mills noted the most important matter weighing in the appellant's favour is his family life here, specifically his close relationships with his wife and three sons. At paragraph [87] he accepted the evidence provided in the witness statements of the appellant and his wife, and also their oral evidence, to the effect that the appellant plays a central role in the lives of his children, in many ways being their primary carer on a day-to-day basis while his wife works to support the family. Judge Mills had no hesitation in finding that it is in the best interests of the children that the appellant remains living with his children. That, he said, is a primary consideration, and weighs heavily in the appellant's favour. Judge Mills accepted the marriage between the appellant and Ms Matematema to be close, with a significant degree of mutual interdependence. He said it is clear that she would have to alter her working hours if the appellant were not in the UK to help with childcare, or perhaps pay privately for care instead. Either way, the quality of life of the household would be negatively impacted by the appellant's removal.

29. Judge Mills found that the appellant's relationship with his wife would effectively be brought to an end by the appellant's deportation, there being no prospect of her following him to Zimbabwe given that she will remain here caring for their three British children who are not being expected to leave the UK. He said, at [89], that absent the higher threshold applicable under s.117C(5), he considered such a separation to be unjustifiably harsh and, therefore, disproportionate.

30. It follows that in my judgement, there is no material error of law in the decision of First-tier Tribunal Judge Mills and the appeal is dismissed.

Notice of Decision

31. The appeal is dismissed.

Signed **V. Mandalia** Date 10 February 2023

Upper Tribunal Judge Mandalia