Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03886/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 21 October 2013

Determination Promulgated:
11 December 2013

Before

THE PRESIDENT, THE HON MR JUSTICE McCLOSKEY
UPPER TRIBUNAL JUDGE HANSON

Between

MR EFFORT NDLOV
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Selway of Halliday Reeves Law Firm

For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION AND PROCEDURAL HISTORY

[1] At the conclusion of the hearing conducted on 21st October 2013 we announced our decision, which was to dismiss the Appellant's appeal. This is our reserved, reasoned judgment.

[2] The Appellant is a national of Zimbabwe, born on 16th May 1972. In brief compass, the procedural history is as follows:

(a) On 23rd March 2003, the Respondent ("t*he Secretary of State*) refused the Appellant's claim for asylum.

(b) On 3rd September 2003, the Adjudicator dismissed his appeal.

(c) In October 2010, still present in the United Kingdom, the Appellant submitted a fresh claim for asylum.

(d) This further claim was not determined by the Secretary of State until some three years later, when a decision dated 11th April 2013 rejecting the Appellant's fresh claim for asylum, his claim for international protection, his claim under the Immigration Rules and his claim under the ECHR was made.

(e) The Appellant appealed. By its determination promulgated on 4th June 2013, the First-Tier Tribunal allowed the appeal under Article 8 ECHR, dismissing it on the asylum and humanitarian protection grounds.

(f) The Secretary of State was granted permission to appeal, giving rise to a decision of Upper Tribunal Judge Hanson setting aside the first instance determination and giving directions for the resumed hearing which we proceeded to conduct on 21st October 2013.

[3] Upper Tribunal Judge Hanson found and decided as follows:

(i) There had been a failure at first instance to properly conduct the Article 8 ECHR exercise. In particular, the judgment lacked the necessary analysis and reasons.

(ii) The Judge's treatment of the introductory tenancy issue was unsatisfactory, being unsupported by appropriate findings and reasons.

(iii) The public interest was not adequately considered in the balancing exercise.

As a result, errors of law were found and the decision of the First-Tier Tribunal was set aside.

THE RESUMED HEARING

[4] The evidence considered by this Tribunal consisted of, in summary:

(a) All of the evidence generated in connection with the first instance hearing.

(b) An Appellant's appeal hearing bundle containing sundry items, including two witness statements and an introductory tenancy.

(c) A further Appellant's bundle, the contents whereof included certain photographs, witness statements of the Appellant and his spouse and some college and local council materials.

[**5**] We have also considered the Determination of the AIT of the appeal of the Appellant's spouse against the Secretary of State's rejection of her asylum and human rights claims and associated decision to remover her, as an illegal entrant, to Zimbabwe heard by Judge Gladstone. The Determination records that the evidence considered by the Tribunal included a witness statement of this Appellant. The evidence summarised in paragraphs 18 *et seq*, in particular paragraphs 24/25, is indicative of markedly little contact – and no active family life – between the Appellant and his spouse during a period of at least seven years from 2002 to 2009. This heavily restricted contact was also a feature of the Appellant's witness statement, summarised in paragraphs 43/44 of the Determination.

[**6**] In his witness statement, the Appellant claimed that he and his spouse had been in a relationship since 1996; that they had undergone a traditional - but not formal – marriage on an unspecified date in January 2002; and that he proceeded to leave Zimbabwe – a country to which he has not subsequently returned – evidently within days of this alleged ceremony: see paragraph 2 of his most recent witness statement. Notably, his first witness statement omits this significant detail. Nor does his first witness statement attempt to date the alleged marriage ceremony. Furthermore, there is no mention of it in his spouse's witness statement, which begins the "story" in 2013. We note further that in Judge Gladstone's detailed résumé of the spouse's evidence, in paragraphs 18 – 29 and 33 – 42 of his Determination, the spouse does not appear to have mentioned the January 2002 marriage ceremony (albeit she asserted the same in her asylum interview) and neither her evidence nor the Appellant's evidence addressed **at all** what may fairly be described as the elephant in the room, namely why they were content to live apart during the subsequent period of seven years. We have considered whether an intelligible and acceptable explanation for this can be inferred from all the evidence. We find ourselves unable to make any such inference. Having considered the evidence critically and realistically, we make the following initial findings:

(a) The Appellant and his "spouse" did not live as unmarried partners in Zimbabwe between 1996 and 2002.

(b) They did not undergo a traditional marriage/wedding in January 2002.

(c) They had no relationship of any kind between 2002 and 2009.

(d) Following the "spouse's" arrival in the United Kingdom in January 2009, the relationship between these two adults had as one of its main aims the fortification of their attempts to remain in the United Kingdom.

[**7**] At this juncture, we add to the above findings the following:

(a) There are two children of the union considered above. They were born on 19th October 2009 and 15th February 2012 respectively. Thus the children are now aged 4 and 1 ½ years.

(b) The Appellant and his "spouse" are the parents of these children.

(c) The Appellant's immigration status is that of illegal immigrant.

(d) The "spouse" and the two children have been granted discretionary leave to remain in the United Kingdom, dating from 21st June 2013 and expiring on 21st June 2015.

(e) The family constituted by the Appellant, his "spouse", and the two aforementioned children, which has developed incrementally since January 2009, **first lived together in the United Kingdom on 26th September 2013** viz just one month ago. Any prior shared residence was at most of a sporadic nature.

(f) The Appellant attempted to advance an innocent explanation for the finding rehearsed immediately above, namely his status of failed asylum seeker. We reject this. We find, specifically, that it would have been possible for the entire family unit to live together under the introductory tenancy which commenced on 29th October 2012 had they wished to do so: there was no legal prohibition. The Appellant, within the terms of clause 9.5 of the agreement, would either have been considered "*part of your* [the tenant's] *household*" **or** the council's written approval could have been obtained.

(g) We accept that during the past year approximately the Appellant and the other three family members have had some contact with their local church, stimulated by their attendances at its services. We find this to have been routine contact and interaction, nothing extraordinary.

[**8**] It is common case that each of the four persons under scrutiny has no British nationality and no EU citizenship. Further, all four are Zimbabwean nationals.

CONSIDERATION AND CONCLUSIONS

[**9**] The asylum and international protection claims of both the Appellant and his "spouse" having been dismissed by due process of law, we proceed on the basis that neither will be at risk of any form of proscribed treatment upon return to Zimbabwe. The submission advanced to this Tribunal by the Appellant's legal representative was that there is a "*reasonable assumption*" that if the Appellant is obliged to return to Zimbabwe, he will do so alone, with his "spouse" and children remaining in the United Kingdom. Thus it is argued, applying the first and second of the **Razgar**

[2004] UKHL 27 tests, that the impugned decision will interfere with the family life in question.

[**10**] We reject this submission. Our primary conclusion is that having regard to the duration of the mother/father relationship (less than 5 years), the dismissal of their asylum and international protection claims, the tender ages of the two children, the limited nature of the leave to remain in the United Kingdom granted to mother and children, the obvious need and desire for the Appellant to continue to perform fatherly duties and the long established and successful business operated previously by the "spouse" in Zimbabwe, the strong probability is that this family will not voluntarily fragment but will, rather, remain together, returning to Zimbabwe in unison. We consider this to be, by some measure, the most likely scenario. Thus the impugned decision will not interfere with their family life.

[**11**] If we are wrong in our primary conclusion, there is no dispute between the parties about the requirements of legitimate aim or in accordance with the law, thereby leading quickly to the question of proportionality. Into this equation enter the various factors rehearsed above, together with the public interest in play, namely that of maintaining firm immigration control and discouraging false asylum and international protection claims. Given our findings above it is clearly reasonable to expect the Appellant and the other three members of the family unit, to continue their extant family life in Zimbabwe, consequent upon his removal there. We consider that there is no real obstacle, insurmountable or otherwise, to this. It has not been shown to be unreasonable in all the circumstances for the family to return as a whole to Zimbabwe where the family life they enjoy can continue. The argument advanced by the Appellant's legal representative was that the decision to remove him to Zimbabwe is perverse. We conclude that the elevated threshold of perversity has manifestly not been overcome and is confounded by our findings rehearsed above.

[12] We further consider that, having regard to the ages of the children concerned, there will be no interference with their private lives. There was no evidence that the children have formed any unusually strong or special friendships or other ties outside their family unit and we find no basis for inferring this. In considering this discrete issue, we take into account the decision in **EA Nigeria** [2011] UKUT 00315 (IAC). If, contrary to this finding, the impugned decision does interfere with the private lives of either child, we are satisfied that it is proportionate, having regard to their limited links with the United Kingdom, the tenuous nature of their immigration status here, their young ages, their nationality and that of their parents and the public interests in play. We refer also to the other factors highlighted in paragraphs [10] and [11] above. As the ECTHR noted in **AA – v – United Kingdom** [Application no 8000/08], the factors to be considered when evaluating proportionality in this kind of case are essentially the same in respect of both family life and private life. We are further satisfied, bearing in mind the decision in **EB (Kosovo) – v – Secretary of State for the Home Department** [2008] UKHL 41, that the regrettable delay of

almost 3 years in determining the Appellant's asylum claim – noted above – does not tip the balance in favour of any of the family members concerned.

[13] In reaching the above conclusions we have considered our duty to identify the best interests of the two children of the family and to accord them the primacy of importance required by section 55 of the Borders, Citizenship and Immigration Act 2009. The duty on the Tribunal is to review the question of whether the Secretary of State's functions have been discharged –

> "….. *having regard to the need to safeguard and promote the welfare of* [the] *the children ….*"

In considering this issue we are mindful of the guidance provided by the Supreme Court in **ZH (Tanzania)** [2011] UKSC 4, which requires that a primacy of importance be accorded to the best interests of any child affected by decisions such as that under scrutiny in the present appeal. We are also mindful of the decision of this Tribunal in **EA Nigeria** [2011] UKUT 00315 (IAC), which held that the correct starting point is that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contraindicating factors. We are satisfied that the Secretary of State has acquitted her duty under section 55 in the present case. We consider that, as in many cases, the best interests of the children will be promoted by the maintenance of the extant family unit intact. Having regard to all of our material findings and evaluative predictions rehearsed above, our firm expectation, based on an assessment of strong probability, is that this family unit will remain together. Furthermore, it is not unreasonable to expect these very young Zimbabwean nationals to be reared in the country of their nationality and that of their parents. In the alternative if, contrary to our findings and assessments, the mother and children were to remain in the United Kingdom, securing still further facilities to do so, the most likely explanation for this would be that the father has not been an integral, active and responsible fatherly member of the family unit. On this alternative scenario, there will be no prejudice to the best interests of the children concerned.

[14] Finally, while this appeal was presented and argued with an almost exclusive focus on the family life dimension of Article 8 ECHR, we address our minds also to the private lives of the two parents. While the evidence bearing on this issue was somewhat meagre, it was sufficient to establish that the impugned decision will entail some interference with the parents' established private lives in the United Kingdom, particularly in the context of the community where they reside and their church congregation. This interference pursues the same legitimate aims which we have already identified and we consider that it will be proportionate for the same reasons as articulated above in respect of the family life of all concerned.

DECISION

[15] We remake the decision by allowing the Secretary of State's appeal. The appeal of the Appellant is therefore dismissed.

ANONYMITY

[16] The First-tier Tribunal made no order under Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We are mindful of our power under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008). We take into account that there was no application for an order under this provision. Having taken care to ensure that there is no identification of the mother or either child in this judgment, we decline to make any order for anonymity. We shall, however, consider any application for such an order duly made in writing within 14 days of the promulgation hereof.

Signed: 

THE PRESIDENT,
THE HONOURABLE MR JUSTICE McCLOSKEY

Dated: 11 November 2013