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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23640/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25th September 2014	**On 24th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

MS TENDAI PHUMELELE MARCIA MUNATSWA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Yong, Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

Details of the Appellant and Proceedings

1. The appellant was born on 22nd November 1983 and is a citizen of Zimbabwe. She appealed before First-tier Tribunal Judge Wright (the Judge) against the decisions of the respondent to refuse to vary her leave to remain in the United Kingdom and to remove her from the United Kingdom by way of directions under section 47 of the Immigration, Nationality and Asylum Act 2006. The appeal was dismissed under

the immigration Rules, Articles 8 and 3 of the ECHR in a determination promulgated on 18th July 2014.

2. Permission to appeal against the decision of the Judge to the Upper Tribunal was granted on 7th August 2014 by First-tier Tribunal Judge Grant-Hutchinson because it was considered arguable that the Judge failed to consider

   (a) the background country information on Zimbabwe which was lodged concerning returning the appellant as a lone female and her child which was raised in the skeleton argument and submissions;
   (b) the fact that the appellant did endeavour to obtain a Zimbabwean passport without success;
   (c) the child's father has no immigration status as a Nigerian national.

   No consideration was made to the ability of the family remaining a family unit when considering section 55 best interests of the child and the fact that he also has an outstanding application in the UK.

3. The matter accordingly came before me for an initial hearing to determine whether the decision of the First-tier Tribunal involved the making of an error on a point of law.

Consideration of Submissions

4. The key background facts of this matter are that the appellant is of Zimbabwean nationality and came to the United Kingdom as a visitor in August 2002, aged 19 years. She was granted subsequent periods of leave during which time she studied and married a British citizen in 2010. The marriage broke down in 2011 and the parties separated. Two months later the appellant moved in with her current partner, a national of Nigeria.

5. On 13th November 2012 the appellant applied for further leave to remain on grounds of private life without making any mention of her new partner or the impending birth of their child which was born on 9th December 2012. The appellant stated on the application form that she was married to a British citizen resident in the UK. The Judge's finding about the application was that the appellant relied misleadingly upon her marriage which had broken down almost a year ago.

6. Ms Yong's submissions to me were that the Judge misdirected herself about the evidence, in particular in relation to whether the appellant had ties with Zimbabwe. The appellant went to Zimbabwe when she was 3 months old but left and went to Swaziland at 8 years of age; she remained there until she came to the United Kingdom in 2002, at the age of 19 years; she is now 30 years of age and no longer has any contact with Zimbabwe. The Judge's findings are submitted to be contrary to the evidence of the appellant that she has no support in Zimbabwe, no prospect of employment and no access to physiotherapy treatment she currently receives in the

UK. Her last visit to Zimbabwe was for her father's funeral and no contact is maintained with relatives there.

7. The Judge's findings are submitted not to be based on the evidence. Ms Young's submission is that if the Judge did not accept the appellant's evidence it was incumbent upon her to give reasons for those findings and she failed to do so; the Judge failed to take into account that the appellant could not renew her Zimbabwean passport. The Judge is submitted to have failed to take account of the appellant's fear of being returned to Zimbabwe as a young female or as mother with a child.

8. The Judge is submitted to have failed to take account of the background country information referenced in the skeleton argument and in oral submissions before her. It is submitted that the Judge could not properly assess the best interests of the child under section 55 and Article 8 without considering the adverse impact of the country situation upon the appellant and her child. Further error is alleged in the Judge's failure to find compelling circumstances to warrant consideration under Article 8.

9. Ms Yong submits that the Judge failed to consider that the appellant's partner is Nigerian, not Zimbabwean; nor did she take account of his pending application to remain in the United Kingdom. The Judge's finding that a child aged 1½ years old could maintain contact with its father by modern means of contact is submitted to be flippant; there could be no meaningful relationship through such means. Ms Yong challenges the Judge's finding that a child could be sent to Zimbabwe in circumstances where her mother would have no employment or income. She challenges the Judge's finding that the appellant was misleading in making her application with reference to her estranged husband but not her partner; she submits that the un-born child could not be included in the application as it was not then a dependant. The Judge failed to consider Beoku-Betts in considering the position of the appellant's partner.

10. Mr Avery submitted that the Judge was entitled to find ties to Zimbabwe in circumstances where the appellant was trying to obtain a Zimbabwean passport. He submitted that it is not clear how the appellant relies upon the background information, whether it is said to show undue harshness, or to be part of an Article 8 consideration. Ms Yong responded by saying that the question of ties in Zimbabwe is of relevance to Article 8 and at the time of the hearing the appellant's partner's application had been allowed to the extent that further information was sought, thereby giving rise to an expectation.

11. Mr Avery relied upon the judge's finding that the appellant could find employment in Zimbabwe so that there was no question of her being destitute there; in these circumstances he submitted that the background evidence becomes irrelevant. Nor does the background evidence show that the general situation in Zimbabwe is such that it would be disproportionate for the appellant to return there. The evidence of her partner was not that he would not support her.

12. Mr Avery also relied upon the Judge's credibility findings. He submitted that the evidence before the Judge was that the appellant's partner has no basis of stay in the United Kingdom and it is therefore speculative to suggest in those circumstances that the family unit would remain intact if the appellant remains in the UK; there is no such certainty. The choice of the appellant's partner is not to go to Zimbabwe with her but Mr Avery submitted that the appellant and her partner have the choice of going together, as a family unit, to his country of nationality, namely Nigeria.

13. Taking account of the grounds of appeal, the permission to appeal and all the submissions before me I am satisfied for the following reasons that the Judge has not erred in law in making her decision. A number of the challenges to the Judge's decision amount in my view to no more than a continuing disagreement with findings reached by her to which she was entitled to come. At paragraph 27 of her determination the Judge makes a clear finding that both the appellant and her partner are not people of truth or credibility. She reached this conclusion in the light of their evidence under cross-examination, their immigration histories and the appellant's criminal convictions.

14. The Judge took account of the appellant's criminal caution for making false representations including her entitlement to work in the UK, her purchase and use of a false passport with a fake visa and her provision to the police of a false name when she was stopped for a driving offence. The Judge took into account the appellant's 6-month sentence of imprisonment for offences of theft from residents in a care home where she worked; she had been in a position of trust and had stolen from vulnerable victims. She was convicted by a jury after pleading not guilty in the Crown Court.

15. In these circumstances I find no merit in any ground of appeal challenging the rejection of the appellant's evidence by the Judge, including her rejection of the appellant's claim to have no ties in Zimbabwe. I am satisfied that the Judge was entitled to reject the appellant's evidence and to reach adverse credibility findings in the light of her clearly stated reasons for doing so. I do not accept the submission that the Judge failed to give reasons for rejecting the appellant's evidence.

16. The Judge has made a very full note of all the evidence and submissions in her determination and took adequate account in my view of the relevant background information. She records, in paragraph 10 of the determination, the appellant's claim that she would be without work and medical support in Zimbabwe. However, the Judge specifically found, in paragraph 40 of the determination, that the BA Hons degree the appellant has obtained in the United Kingdom will assist with her employment prospects in Zimbabwe.

17. In the final paragraph of her determination the Judge observed that there was only a passing reference to Article 3 of the ECHR in the grounds of appeal in general terms. She states that the appellant's representative did not rely on Article 3 in submissions or in her skeleton argument. I find no error in these circumstances in the Judge's

consideration of the evidence before her including such background evidence as she found relevant.

18. The Judge was in my view entitled to find that the appellant had ties in Zimbabwe in the light of her response in cross-examination when she was asked whether she had researched the job situation in Zimbabwe. She replied that she had looked last year generally at the economic situation there; she said that she had spoken to people about Zimbabwe and Africa. The appellant's evidence, also recorded in paragraph 10 of the determination, was that her father's nieces and nephews are in Zimbabwe; the Judge noted the lack of supporting evidence to show the appellant's father to be deceased as claimed in Zimbabwe.

19. The Judge directed herself in accordance with the case of Ogundimu and took account of the appellant's evidence that she speak the language of Shona which is spoken in Zimbabwe. The Judge found that the appellant has cousins in Zimbabwe and on her own admission at the date of application she was in the process of renewing her Zimbabwean passport, although it was then taking longer than she expected. The Judge was in my view justified in concluding that the evidence as a whole amounted to a continuing connection to life in Zimbabwe. In these circumstances I do not accept that the Judge erred in any failure to consider the position of the appellant on return to Zimbabwe as a lone female or mother. The Judge does not accept that on return to Zimbabwe the appellant would be without family, prospects, or connections.

20. Nor do not I accept the submission that the Judge erred in finding no compelling circumstances or any exceptional reasons to consider the matter under Article 8 of the ECHR. She undertook a careful analysis of the evidence and in paragraphs 33 – 40 of her determination and directed herself appropriately in relation to a range of relevant case law. In paragraph 39 of her determination the Judge found the relationship between the appellant and her partner to have been formed in circumstances they knew to be precarious for immigration purposes.

21. In paragraph 39 of the determination the Judge took account of the best interests of the child and found those to be that she remain with her mother; there was no question that they would be separated from one another in the event of the appellant's removal; they would be removed together. The Judge in my view directed herself quite properly that the child's best interests were a primary consideration. The Judge further directed herself in accordance with the case of Azimi-Moyayed that as a starting point it is in the interests of children to be with both their parents. In paragraph 40 the judge reminded herself that the child in this case is not British and does not therefore have entitlement to the benefits that go with that nationality.

22. I am satisfied that the Judge was well aware of the appellant's partner's application and took it into account. In paragraph 14 of the determination she records his evidence that he has an outstanding appeal with the Home Office which was

remitted in January 2014. The Judge took account of the impact on the appellant's partner of her removal as follows. In paragraph 39 of her determination the Judge found:

> "the child's father…is free to leave the UK to be with them regardless of the outcome of his outstanding (claimed) immigration appeal (said to be against refusal of permanent residence based on an EEA marriage here following his illegal entry into the UK in 2002 on a passport for which he admitted he paid £600 and knew to be false/not to be his) and that it would be unreasonable in all the circumstances for him to do so (if his relationship with the appellant is truly genuine as claimed)."

23. The Judge took into account the evidence of the appellant's partner that he would not go to Zimbabwe with her; he said he would be devastated by the separation but he has been present in the UK for 10 years and has work here. The Judge further noted that the appellant is still married to her British husband and not to the father of her child .I do not accept that the Judge failed to take account of the Nigerian nationality of the appellant's partner.

24. In paragraph 39 of her determination the Judge took full account of the nationality of all the parties involved; she notes that it was accepted that neither the appellant, her partner, nor their child has any immigration status in the United Kingdom. I find merit in the submission made for the respondent that the evidence before the Judge was that the appellant's partner has no basis of stay in the United Kingdom and it is therefore speculative to suggest in those circumstances that the family unit would remain intact if the appellant remains in the UK; there is no such certainty.

25. Looking at the determination as a whole I am satisfied that the Judge has reached reasoned conclusions to which she was entitled to come. I find no misdirection in law, no failure to consider relevant factors or evidence. I find that the making of the decision did not involve the making of any error on a point of law and it follows that the Judge's decision stands and this appeal to the Upper Tribunal is dismissed.

Summary of Decisions

26. The making of the decision in the First-tier Tribunal did not involve the making of an error on a point of law and it follows that the Judge's decision stands.

27. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an order pursuant to the rule then in force, rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed: **J Harries**

Deputy Upper Tribunal Judge Date: 23rd October 2014

Fee Award

The position remains that no fee award is made.

Signed: **J Harries**

Deputy Upper Tribunal Judge Date: 23rd October 2014