Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/22596/2012
OA/22597/2012
OA/22598/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 November 2013	**On 17 January 2014**

Before

THE HON MR JUSTICE CRANSTON
UPPER TRIBUNAL JUDGE MOULDEN

Between

MS JENNIPHER DAPI (1)
MISS JOSLINE TINOTENDA SHASHA (2)
MASTER DARLEEN TAKURA SHASHA (3)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms B Lams, Solicitor instructed by Pickup Scott Solicitors
For the Respondent: Ms S Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the decision of the Upper Tribunal on an appeal from a decision of Judge Thanki sitting in the First-tier Tribunal on the grounds that there was an error of law in his decision to dismiss the appellants' appeal against a refusal of entry clearance.

2. The appellants are citizens of Zimbabwe, the first appellant being the mother of the other two appellants, Josline who is 16 years old and Darleen who is 11 years old. The first appellant is a secretary.

3. The appellants applied on 4 July 2012 for entry clearance to settle in the United Kingdom to join the sponsor, the husband and father who is present and settled in this country. He arrived in the United Kingdom in 2002 and sought asylum. That was refused. In his asylum application he mentioned his wife and his children who he named. The Immigration Judge who heard the asylum appeal accepted that the appellant had a wife and children in Zimbabwe.

4. In September 2010 the sponsor was granted indefinite leave to remain. In these proceedings he has explained that he left the first appellant, at that stage his common law wife, behind in Zimbabwe at the time she was pregnant with their second child Darleen. He states that he supported the family from the United Kingdom. He visited Zimbabwe in 2010 and at that point married the first appellant. He has returned subsequently on three occasions, in 2011 when he remained for a month, in 2012 when he remained in Zimbabwe for six weeks and more recently. He is a registered mental health nurse. He pays school fees for the children to attend private education in Zimbabwe. He is employed as a staff nurse at Kneesworth House Hospital and has an annual salary of some £32,000. There is accommodation for him available associated with the hospital and there was a letter which indicates that the accommodation comprises a number of bedrooms, a kitchen, a lounge and two toilets. That property is available for occupation by the family should they come to this country.

5. In his determination the judge addressed two matters. The first was that the first appellant had not provided evidence of her competence in English to a minimum level A1. In considering this matter the judge firstly noted the relevant dates - the application for settlement was made on 4 July 2012, the entry clearance decision was dated 29 September 2012 and the review by the Entry Clearance Manager was dated 18 March 2013. The judge noted Section 85(5) of the Nationality, Immigration and Asylum Act 2002 under which an entry clearance appeal is to be determined solely on the basis of circumstances appertaining at the time of the decision.

6. Before the judge an IELTS certificate was produced. That was dated 19 April 2013 and on that basis it was said that the first appellant thereby satisfied the English language test requirement. The judge considered that the application of Section 85(5) and also the decision in **DR (ECO post-decision evidence) Morocco [2005] UKIAT 00038**. He said it was clear that, whether or not the certificate established the first appellant's competence in English, it was not before the decision maker on 29 September nor before the Entry Clearance Manager on 18 March 2013. He concluded therefore that the Secretary of State had not known that the first appellant had the necessary competence in English at the date of the decision.

7. The other issue the judge considered was the issue of family life. He concluded that the parties were in a relationship akin to marriage prior to their legal marriage in 2010. The fact that the appellant had retuned to Zimbabwe on three occasions since he had been granted indefinite leave to remain satisfied him to the relevant standard that the first appellant and the sponsor were in a durable relationship and intended to spend their lives together as husband and wife. Nonetheless the judge said that there was no evidence before him that the appellants had Article 8 family life rights between the time the sponsor arrived in the United Kingdom in 2002 and his return to Zimbabwe for the first time in 2010. Any family life that they had together was constituted by the three visits by the sponsor since 2010. Therefore there were no family life rights engaged in the refusal of entry clearance by the Entry Clearance Officer. He therefore concluded that Article 8 ECHR rights could not be used to plug the first appellant's inability to meet the requirements of the Immigration Rules as at the date of the decision.

8. The first issue in our view is the issue of family life. That is essentially a question of fact. We accept that separation, especially over a substantial period of years, can result in individuals not feeling the commitment necessary to establish family life. That was the conclusion of the judge. With great respect however we have concluded that the judge was in error in this regard. The sponsor had left Zimbabwe in 2002 when the first appellant was pregnant with Darleen and Josline had already been born. There was a statement to the effect that he had been living with the first appellant before he left Zimbabwe. In the asylum claim in 2006 he mentioned his wife and children who he named and the judge who considered the asylum application at that time accepted that he had a wife and children in Zimbabwe. The judge also accepted that there was now a durable relationship and that the couple intended to spend their lives together with their children. As soon as his immigration status was clarified in 2010 he returned to Zimbabwe and, as we have said, he returned on four occasions. Thus, in our view, there was evidence to the effect and we have concluded that there was family life.

9. The issue then becomes what is the implication of that for this appeal. Mr Scott on behalf of the appellants submits that the appellants have now effectively met all the requirements of the Immigration Rules. The only defect was that at the time of the application the language test had not been met. He points us firstly to the fact that the certificate is now available but also highlights the explanation given, namely that at the time of the applications it was believed that the first appellant was exempt from the English language requirement because Zimbabwe was an English-speaking country and it was only subsequently when refusals were received that it was realised that the certificate should have been produced. In his submission the gap has now been plugged and given that we have found that there was family life that is sufficient and should be taken into account. It would in his submission be disproportionate for the applicants to be refused on the basis of the English language requirement.

10. With some regret we have come to the opposite conclusion. In his submissions Mr Laws accepted that this was a near miss case. The fact was that the first appellant had not produced an English language certificate at the time of the application or before the Entry Clearance Manager. There was a very clear failure to meet the Rules. There is clear authority from the Court of Appeal in **Miah** that in a near miss case it is not possible through Article 8 to remedy the defect. We note that the steps which the appellants need to take are clear and relatively straightforward. They can re-apply, albeit that there is a delay involved and albeit that there will be a cost. In our view though there is this perfectly simple way of overcoming the issue and the failure to meet the Immigration Rules.

11. In passing we note that the sponsor had ILR from 2010 and it would have been possible at that point to make the application. We also note the position of the children. In entry clearance cases such as this their position does not feature as prominently as it would in other cases – see **SG [2012] UKUT 00265 (IAC)** at paragraph 53 and **MK [2011] UKUT 00472 (IAC)**. Nonetheless we have considered the position of the children with some care. There is no evidence before us of any evident consequences of the children remaining in Zimbabwe as opposed to coming to this country. There is no suggestion in the evidence that the education that they are receiving there is worse than they would receive here. Earlier we mentioned the fact that the sponsor is paying for the children to receive education in Zimbabwe. There is the issue that the children are not with their father but we simply note that they have been separated from him for a considerable period, 2002 to 2010 with no visits and since then with only occasional visits. In our view therefore there is no strong if any evidence that their best interests would be served by being here whatever the position might in reality be. That being the case we dismiss the appeal.

Signed Date

Mr Justice Cranston