Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09276/2015

THE IMMIGRATION ACTS

Heard at : IAC Birmingham	**Decision Promulgated**
On : 15 May 2017	**On : 22 May 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

OLIVER MUCHENJE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Farhat of Gulbenkian Andonian Solicitors
For the Respondent: Ms Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before me following the grant of permission to appeal on 6 March 2017.

2. The appellant is a national of Zimbabwe, born on 30 September 1973. He applied for entry clearance to the UK as a spouse, to join his wife, an Ethiopian

citizen who had been granted leave to remain in the UK as a refugee from 25 January 2012 until 24 January 2017.

3. The circumstances of the appellant's relationship with the sponsor are somewhat complicated and are of relevance in this appeal. The couple met through an online dating website in early 2007 and their relationship developed. They met in person in August 2007 in Ethiopia and the appellant then returned to Ethiopia in October 2007 to meet the sponsor's family. They got engaged in Ethiopia on 13 October 2007 and were married in Addis Ababa, Ethiopia, on 3 January 2008. They then lived together as husband and wife in Bahrain, where the appellant was working, until the sponsor travelled to the UK to undertake an MSc degree, in August 2008, with the appellant sponsoring her financially. He was unable to visit her in the UK because of previous traffic offences which prevented him obtaining a visit visa. The appellant acquired a work permit for the UK in late 2008 and was offered various jobs but he declined the offers as he and his wife did not intend to settle in the UK at that time. In 2009 the appellant started his own consultancy firm in South Africa and travelled frequently. When the sponsor completed her studies in 2009 they met up in Zimbabwe, and then again in 2010 in South Africa. They decided that the sponsor would remain in the UK to gain work experience, but the distance affected their marriage and they encountered marital problems. The appellant secured a consultancy position in Saudi Arabia and worked there on a business working visa and their relationship deteriorated. In April 2011 the sponsor was made redundant and she decided to return to Ethiopia and purchased a ticket for her return on 12 October 2011. However she did not return because she learned of the arrest of a friend in Ethiopia, an active supporter of the Oromo Liberation Front (OLF), a party she also supported, and she was told that the security services were looking for her. She then decided to remain in the UK and she claimed asylum and was granted refugee status on 25 January 2012. From December 2012 contact resumed and the couple reconciled. They met up in South Africa in 2013 and 2014, in Zimbabwe in 2014 and then several times in France in 2015 and 2016. The appellant remained residing in the UAE but the sponsor could not obtain a visa to meet him there. After taking a holiday together in Zimbabwe and South Africa in November 2014 the sponsor became pregnant, in December 2014. The pregnancy had to be terminated due to complications and the couple met up in Paris to spend time together. They tried to conceive again but were unsuccessful.

4. The appellant made his application for entry clearance on 20 August 2015. His application was refused on 28 September 2015. The respondent noted that the appellant had a record of five criminal offences in the UK between December 2001 and 2004 when living there and considered him to be a persistent offender. It was noted that he had failed to declare his UK offences in a previous visit visa application and therefore considered that he had failed to demonstrate a change of character. In the light of such conduct the respondent considered it undesirable to issue the appellant with entry clearance and refused his application under the suitability provisions in S-EC.1.5 and 2.5(b). The respondent considered the appellant's application under paragraph 352A for family reunion but was not satisfied that he would be

eligible as a pre-flight partner since the sponsor stated that they were separated when she made her application for leave to remain in the UK and they had not demonstrated that they had ever lived together as husband and wife and had a subsisting relationship before she left Ethiopia. The application was therefore considered under Appendix FM as a post flight spouse since the marriage was rekindled in 2012 after the sponsor was granted leave to remain as a refugee. The respondent was not satisfied that the appellant's relationship with the sponsor was genuine and subsisting or that they intended to live together permanently as husband and wife and therefore also refused the application under paragraph EC-P.1.1(d) of Appendix FM. As for Article 8 outside the rules, the respondent considered that there was nothing preventing family life from being pursued in Zimbabwe or the UAE.

5. The appellant appealed that decision and his appeal was heard in the First-tier Tribunal on 13 December 2016 and dismissed in a decision promulgated on 21 December 2016.

6. The appeal was heard by Designated First-tier Tribunal Judge McCarthy who identified that there was only one ground of appeal, namely that the decision was contrary to s6 of the Human Rights Act 1998. The judge accepted the account given of the couple's relationship. He accepted that they were in regular contact, that they sought to be together when they could and that the relationship was genuine and subsisting. He accepted that they enjoyed family life. The judge accepted further that the couple could not live together in Ethiopia or the UAE. He found there to be no evidence that the sponsor could not live in Zimbabwe but accepted that that would have serious consequences for the continuation of her private life rights and that the burden in relation to Article 8(1) of the ECHR had been met. He then went on to consider proportionality. The judge rejected the respondent's reasons for not considering the application as a pre-flight one and found that paragraph 352A was applicable. However he did not accept that the couple intended to live together permanently in the UK and on that basis concluded that the requirements of paragraph 352A and Appendix FM were not met and that the decision refusing entry clearance was justified. The judge considered the suitability provisions and the appellant's past convictions but considered that the respondent had failed to meet the burden of proof in that regard. He noted that the convictions were all for driving offences, for which the appellant had received fines and periods of disqualification, and that all were spent convictions. He accepted the appellant's explanation for not having declared all the offences and found that there was no public interest in refusing entry clearance because of the appellant's past offences. However taking all matters into consideration he concluded that the public interest was in the respondent's favour and that the decision was proportionate. He found there to be no breach of Article 8 and he dismissed the appeal.

7. Permission to appeal that decision was sought on two main grounds: that the judge had erred in his finding that family life could continue in Zimbabwe and that such a finding was contrary to the country guidance in RN (Returnees) Zimbabwe CG [2008] UKAIT 00083; and that the judge's findings on intention

to live together permanently were inconsistent and failed to take account of material evidence.

8. Permission to appeal was granted on all grounds.

Appeal hearing

9. The appeal came before me on 15 May 2017 and I heard submissions on the error of law.

10. Mr Farhat submitted with regard to the first ground that the couple would not be able to relocate to Zimbabwe and that the judge had erred in finding that they could. He relied on the case of RT (Zimbabwe) in submitting that they would be unable to demonstrate loyalty to the regime, due to the appellant's lengthy absence and the sponsor's status as a refugee in another country and her political activities in Ethiopia. With regard to the second ground Mr Farhat submitted that the judge had ignored various factors and had ignored the fact that the appellant's willingness to give up his salary in the UAE and start a family with the sponsor showed an intention for them to live together permanently. Further, the judge had ignored evidence in the grounds of appeal before him that the couple were buying a property in Manchester, which was a major step in cementing their intention to live together permanently in the UK. Further, the judge had not considered that the appellant was very employable in the UK as a quantity surveyor. The documentary evidence showed a clear commitment for the couple to be together.

11. Ms Pettersen submitted that there was no evidence before the judge to suggest that the couple could not be admitted to Zimbabwe or considered themselves to be at risk there. With regard to the judge's findings on the couple's intentions, she submitted that the appellant would need to show perversity in the judge's findings which he could not do. Even if he had omitted considering the proposed property purchase in Manchester there was sufficient reasoning otherwise.

12. Both parties agreed that if I were to find an error of law in the judge's findings on the couple's intentions I could re-make the decision on the evidence before me without a further hearing.

Consideration and Findings

13. It was accepted by both parties that if the second ground of appeal were made out, the first ground would effectively fall away. Accordingly, and in light of my findings below, I do not propose to deal with the first ground in any detail, save to say that I find little merit in the assertions therein, which rely on outdated country guidance and raise issues not argued before the judge. I turn, therefore, to the second ground relating to the judge's findings on the couple's intentions.

14. At [38] the judge considered the couple's evidence as to the reasons why they had decided to seek to live together, namely to increase their chance of having children, particularly after the sponsor's miscarriage. Their evidence was that they had opted to make the UK their home because of the sponsor's refugee status and residence here. At [39] and [40] the judge gave reasons for concluding that that was not sufficient to satisfy him that they intended to live together permanently in the UK. Those reasons were essentially that there was no evidence of the appellant looking for work in the UK since rejecting a job offer in 2008 and that there was no reasonable explanation why they would forego the appellant's substantial income from his employment in the UAE.

15. Had there been no other considerations or evidence to consider, and had Judge McCarthy considered and addressed all the evidence in reaching those findings, I would agree with Ms Pettersen that the appellant would have to meet the high threshold of showing perversity in order successfully to challenge the judge's conclusion in that respect and that he may be in some difficulty in doing so. However it seems to me that there is an error of law in the judge's conclusion arising from an omission to address all the evidence when considering the parties' intentions.

16. There was evidence before the judge that the couple were purchasing a property in Manchester together and that was specifically referred in the grounds of appeal before the judge at page 15. That was not a matter to which the judge referred and it appears that he may have overlooked it entirely. The judge accepted the evidence given by the couple about the nature of their relationship over time and there is therefore no reason why the purchase of a property in the UK ought not to have been given weight. Ms Pettersen accepted that there was no challenge to that evidence. I do not agree that such an oversight was minimal or immaterial, particularly when considering the finely balanced conclusion reached by the judge and the otherwise positive findings that he made about the relationship. It is clear from his findings at [40] that the only evidence he considered in support of the appellant's claim of his changed intentions since 2008, as to his place of work, was the parties' stated wish to start a family. Had he also taken into account the fact that the couple were purchasing a property in the UK it may well be that his conclusion would have been different.

17. Accordingly I find that the failure to consider this evidence was a material omission amounting to an error of law and I therefore set aside the judge's findings on the parties' intentions.

18. As already mentioned, Mr Pettersen was content for me to re-make the decision on the evidence before me and there was no challenge to the evidence that the couple were purchasing a property together in Manchester. Adding that evidence into the balance undertaken by Judge McCarthy, and considering the evidence that the couple wished to start a family, and taking note also of the appellant's qualifications and evident employability in the UK as a quantity surveyor, I find no reason to doubt that their intentions were and are as claimed, namely to put down roots in the UK and settle here

permanently and I accept that the balance falls in the appellant's favour in that respect.

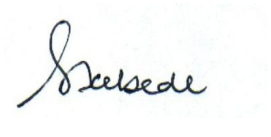
19. Turning to the other requirements in paragraph 352A and Appendix FM, there has been no challenge to the judge's findings that they had been satisfied. I have some reservations as to whether the complex history of the couple's relationship would indeed fall within the terms of paragraph 352A, particularly considering the qualification in paragraph 352A(ii) as to the timing of the sponsor's departure from her country "*in order to seek asylum*". However the respondent has not sought to challenge Judge McCarthy's finding that this was a pre-flight case falling within paragraph 352A. Accordingly I accept that the appellant has demonstrated an ability to meet the criteria in paragraph 352A of the immigration rules. However even if that were not the case the appellant has, on the other unchallenged findings made by the judge in regard to suitability and the genuineness of the marriage, clearly met the requirements in Appendix FM. The respondent's decision, furthermore, makes it clear that the financial requirements and the English language requirements were met.

20. Of course since the respondent's decision is appealable only on the ground that the refusal of entry clearance was contrary to s6 of the Human Rights Act 1998, the fact that the appellant could meet the requirements of the immigration rules is not the end of the matter. However, as found in the case of Kaur (visit appeals; Article 8) [2015] UKUT 00487 it can be a weighty matter, and that is particularly so in this case, given the nature of the appellant's application. Judge McCarthy's conclusion, that the decision to refuse entry clearance was proportionate and thus not in breach of Article 8, was based upon the fact the appellant could not meet the requirements of the immigration rules. The question of the couple's ability to relocate to Zimbabwe was of some weight in his consideration in the circumstances. However, in light of the judge's observations at [28] as to the serious consequences to the sponsor's private life of expecting her to move to Zimbabwe, considering that she has been recognised as a refugee in the UK, and given Ms Pettersen's properly made acknowledgement that the first ground of appeal effectively fell away if the second ground was met, I do not consider that such a consideration would tip the balance in favour of the public interest when there was otherwise an ability to meet the requirements of the immigration rules.

21. Accordingly, I find that the respondent's decision to refuse entry clearance to the appellant amounts to an unjustified interference with the appellant's family life with the sponsor and that is it not proportionate in terms of Article 8. I allow the appeal on Article 8 human rights grounds.

DECISION

22. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision and re-make it by allowing the appellant's appeal on Article 8 human rights grounds.

Signed: 

Upper Tribunal Judge Kebede Dated: 16 May 2017