Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/27081/2015**

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 5th June 2017	**On 20th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

TIRUMBE CHIMANGO NGWIRA
(ANONYMITY ORDER NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss K Tobin of Counsel instructed by TRP Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Ford of the First-tier Tribunal (the FtT) promulgated on 16th September 2016.

2. The Appellant is a male Zimbabwean citizen born 26th January 1983. His immigration history is set out below.

3. The Appellant entered the United Kingdom as a visitor on 11th October 2002. He overstayed and remained without leave. He was encountered by the authorities on 29th June 2009 when his lack of status was

discovered, and he then made an asylum claim. This was refused on 23rd July 2009, and the Appellant's appeal was dismissed by the FtT in September 2009.

4. The Appellant continued to remain in this country without leave, making further submissions in relation to his asylum claim, which were refused by the Respondent.

5. The Appellant married a British citizen, Adelaide Ngwira, on 15th November 2014. On 28th May 2015 the Appellant applied for leave to remain based upon his family and private life.

6. This application was refused on 17th July 2015, and a letter of that date from the Home Office contains the reasons for refusal which are summarised below.

7. The Respondent considered the requirements of R-LTRP.1.1.(d) of Appendix FM. It was accepted that the Appellant satisfied the suitability requirements in S-LTR, and the requirements of E-LTRP.1.2–1.12 and 2.1. However the Respondent did not accept that EX.1(b) was satisfied. It was accepted that the Appellant has a genuine and subsisting relationship with his British partner. It was acknowledged that the Sponsor had lived in the UK all her life (this is incorrect, it is accepted by the Appellant that the Sponsor arrived in the UK when aged 9 from Burundi). The Respondent accepted that the Sponsor has employment, and the couple relocating together may cause a degree of hardship for her, but it was not accepted that this amounted to insurmountable obstacles as defined by EX.2.

8. The Respondent considered the Appellant's private life with reference to paragraph 276ADE(1)(vi) not accepting that the Appellant had proved that there would be very significant obstacles to his integration into Zimbabwe.

9. The Respondent considered whether there were any exceptional circumstances which would justify granting leave to remain pursuant to Article 8 outside the Immigration Rules, and decided that there were not.

10. The Appellant appealed and the FtT hearing took place on 2nd September 2016 and was dismissed.

11. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds are summarised below.

12. It was contended that the FtT materially erred in failing to allow the appeal on human rights grounds, having accepted (paragraph 23) that there were insurmountable obstacles to family life abroad.

13. It was noted that the Respondent's sole basis for refusal pursuant to the ten year partner route, was that there were no insurmountable obstacles.

14. It was contended that the FtT erred at paragraph 42 in finding that the Appellant did not satisfy the Immigration Rules. It was clear from

paragraph 23 that the FtT had found that the Immigration Rules were in fact satisfied.

15. The FtT erred in concluding that it would be appropriate for the Appellant, notwithstanding that the Immigration Rules were satisfied, to leave the United Kingdom and make an entry clearance application from Zimbabwe. It was contended that the FtT had not explained how this would be in the public interest, and it was clearly the intention of parliament that those who face insurmountable obstacles to family life continuing in another country, can apply for and be granted leave to remain in the United Kingdom. Reference was made to GEN.1.1 which sets out the purpose of the rules within Appendix FM, and it

> "sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic wellbeing of the UK".

16. Permission to appeal was granted by Judge Pedro of the FtT and I set out below the grant of permission in part;

> 2. The grounds assert that the judge erred in failing to allow the appeal on human rights grounds having found that the requirements of the Immigration Rules were met.
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> 3. The judge clearly found that EX.2 was met [23] which appears to have been the only issue under the rules. It appears inconsistent and unexplained why the judge stated later in the decision that the rules were not met [42].
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> 4. The grounds disclose an arguable error of law capable of affecting the outcome.

17. Following the grant of permission the Respondent submitted a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the FtT directed itself appropriately. It was contended that the FtT was entitled to consider whether it is appropriate for the Appellant to obtain the correct entry clearance. The FtT had not accepted the Appellant's evidence concerning his circumstances in Zimbabwe.

18. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

19. Miss Tobin relied upon the grounds contained within the application for permission to appeal and the grant of permission. I was asked to find that the FtT had clearly found in paragraph 23 that there were insurmountable obstacles to family life continuing outside the United Kingdom, and the FtT had thereafter erred in considering it appropriate for the Appellant to

leave the United Kingdom alone, and make an entry clearance application from abroad. I was referred to Chen (IJR) [2015] UKUT 00189 (IAC) which confirms that Appendix FM does not include consideration of the question of whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application. Miss Tobin submitted that leaving to make an entry clearance application from abroad should only be considered if there are no insurmountable obstacles to family life continuing outside the United Kingdom.

20. Mrs Aboni argued that the FtT decision should stand, and relied upon the rule 24 response. Mrs Aboni argued that the FtT was entitled to take into account the public interest considerations in section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

21. By way of response Miss Tobin submitted that there is no public interest in removal, if the Immigration Rules which set out the requirements for leave to remain as a partner, are satisfied.

22. I indicated at the hearing, that in my view the FtT had materially erred in law and the decision was set aside. I gave my reasons orally, and confirmed that these would be put into writing.

23. I then asked for the views of the representatives as to how the decision should be re-made. Both representatives were in agreement that the decision should be re-made by the Upper Tribunal, based upon the evidence that was before the FtT, without a further hearing.

My Conclusions and Reasons

24. My reasons for finding a material error of law are as follows.

25. The Respondent's sole reason for refusing the Appellant's application for leave to remain based upon his marriage to a British citizen, was that EX.1(b) was not satisfied on the basis that there were no insurmountable obstacles to the Appellant and Sponsor continuing family life with each other outside the United Kingdom. For ease of reference I set out below EX.1(b) (EX.1(a) is not relevant as the couple do not have children). I also set out EX.2;

> EX.1 (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
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> EX.2 For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

26. If the Respondent had found insurmountable obstacles to family life continuing outside the United Kingdom, then the Appellant would have been granted leave to remain under the ten year partner route, as R-LTRP.1.1.(d) would be satisfied. There would have been no consideration of whether it was appropriate for the couple to separate, and for the Appellant to leave the United Kingdom and apply for entry clearance from abroad. There would be no point in this, because the Respondent's own rules would be satisfied if there were insurmountable obstacles.

27. The FtT at paragraph 21 expresses agreement with the Secretary of State's conclusion on the issue of whether there were insurmountable obstacles, to the continuation of the Appellant's relationship with the Sponsor should he be obliged to return to Zimbabwe, and in paragraph 22 considers whether the Appellant could return to Zimbabwe on his own in order to make an entry clearance application, or whether the couple could relocate to Zimbabwe together.

28. The FtT is unequivocal in paragraph 23 in finding that there are insurmountable obstacles to family life between the Appellant and Sponsor continuing outside the United Kingdom. The FtT makes reference to the Sponsor having been in the United Kingdom since she was 3 years of age, although the skeleton argument submitted on behalf of the Appellant indicated that she came to the United Kingdom at 9 years of age from Burundi. It is common ground that she has never lived in Zimbabwe and is a British citizen.

29. There has been no challenge by the Respondent to the FtT finding as to insurmountable obstacles in paragraph 23.

30. The FtT at paragraph 24 expresses the view that the couple continuing family life in Zimbabwe is not the only option, and the Appellant could leave the United Kingdom and return to Zimbabwe alone and make an application for entry clearance and this would not entail insurmountable obstacles to family life. This would however mean the couple could not continue the family life together that they enjoy in the United Kingdom because there would be a separation. As indicated in Chen, Appendix FM does not include consideration of whether it would be disproportionate to expect an individual to return alone to make an application for entry clearance from abroad. The question to be decided in EX.1.(b) and EX.2 is whether there are insurmountable obstacles to the couple living together outside the United Kingdom. The FtT found there were insurmountable obstacles.

31. The FtT has not given adequate reasons as to why, given that finding, that the public interest meant that the Appellant's appeal should be dismissed. The FtT does not explain the reference at paragraphs 39 and 42 to the Appellant being unable to meet the Immigration Rules. The finding at paragraph 23 means that the Immigration Rules, in particular R-LTRP.1.1. (a), (b) and (d) are satisfied. This is the section within the Immigration

Rules which sets out the requirements for limited leave to remain as a partner.

32. For the above reasons, I found a material error of law and set aside the decision of the FtT.

33. As invited by both representatives I now re-make the decision. It is important to note that the FtT finding at paragraph 23 that there are insurmountable obstacles to family life between the Appellant and Sponsor continuing in Zimbabwe has not been the subject of any challenge from the Respondent. Therefore that finding must stand.

34. This means that the Immigration Rules setting out the requirements for limited leave to remain as a partner are satisfied. These are the rules, as explained in GEN.1.1 of Appendix FM that reflect how under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) the balance will be struck between the right to respect for private and family life and the legitimate aims protecting national security, public safety and the economic wellbeing of the United Kingdom, and which also reflect the relevant public interest considerations as set out in Part 5A of the 2002 Act (which includes section 117B).

35. There would therefore appear to be no need to undertake a separate consideration of section 117B, which would be necessary if Article 8 outside the Immigration Rules was being considered. I will however consider section 117B which states that the maintenance of effective immigration controls is in the public interest.

36. It is in the public interest that persons seeking to remain can speak English and are financially independent. The Appellant can speak fluent English, and it is accepted that the financial requirements of Appendix FM are satisfied, and this was found to be the case by the FtT (paragraph 13 of the FtT decision). The ability to speak English and financial independence are however neutral factors. Little weight should be given to a private life established when a person has either a precarious immigration status or no status. The Appellant has had no legal status since his leave as a visitor expired in the early part of 2003. However he does not rely upon his private life. He is relying upon his family life with the Sponsor.

37. Section 117B states that little weight should be given to a relationship formed with a qualifying partner that was established when the person is in the United Kingdom unlawfully. That would apply to the Appellant, because his relationship with the Sponsor began in this country, when he was here unlawfully.

38. However I find that the public interest does not require the Appellant's removal from the United Kingdom. I find that I must place very substantial weight upon the fact that he satisfies the requirements set out in Appendix FM, in order to be given leave to remain in the United Kingdom as the partner of a British citizen. Because he satisfies the Immigration Rules, I conclude that the Respondent has not shown that there is any public

interest in removing the Appellant from this country. It has not been suggested that he has been engaged in any criminal activity, and it is not the case that he would need to have recourse to public funds. Therefore his appeal must succeed.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. I re-make the decision by allowing the Appellant's appeal on human rights grounds.

Anonymity

The FtT made no anonymity direction. There has been no request for anonymity and I see no need to make an anonymity order.

Signed Date 8th June 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

Because I have allowed the appeal I have considered whether to make a fee award. I make no award. The appeal has been allowed because of evidence submitted to the Tribunal after the Respondent refused the application.

Signed Date 8th June 2017

Deputy Upper Tribunal Judge M A Hall