Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11487/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 January 2019	**On 12 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUENZANISI TOGAREPI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis Senior Home Office Presenting Officer
For the Respondent: No Legal Representation

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appealed against a decision of Judge Bowler (the judge) of the First-tier Tribunal (the FTT) promulgated on 24 July 2018.

2. The respondent before the Upper Tribunal was the appellant before the FTT and I will refer to him as the claimant. He is a citizen of Zimbabwe born 2 September 1984.

3. The claimant appealed against the respondent's decision dated 18 September 2017 to refuse his application for leave to remain in the UK on human rights grounds.

4. The appeal was heard on 11 July 2018. The claimant had applied for further leave to remain as a spouse of a refugee but by the date of the FTT hearing it was accepted that his marriage had ended. The claimant had started a new relationship with a British national but this had not been considered by the Secretary of State and was therefore a 'new matter' as defined by section 85 (6) of the Nationality, Immigration and Asylum Act 2002 and could not be considered by the FTT without the consent of the Secretary of State which was not given. The appeal therefore proceeded on the basis of the claimant's private life. The judge observed that the claimant needed to make a separate application to the Secretary of State if he wished his relationship with his new partner to be considered.

5. The judge noted that the claimant originates from Harare and considered EM and Others (Zimbabwe) CG [2011] UKUT 98 (IAC) observing that Harare is a high-density area and the judge therefore decided that there would be a significant risk that the claimant would be homeless if returned to Zimbabwe. On that basis the judge found the claimant would face very significant obstacles to integration and concluded that the requirements of paragraph 276 ADE (1) (vi) ware satisfied.

6. In considering article 8 of the 1950 European Convention the judge found the claimant had three adult siblings in the UK but his relationship with those siblings did not engage article 8 on a family life basis. The judge found that the claimant had established 'a particularly rich private life in the UK' and had resided in the UK since 30 August 2008. The judge acknowledged that section 117B of the 2002 Act established that little weight must be given to private life established by an individual when in the UK with a precarious immigration status but recorded that 'little weight does not mean no weight. I cannot ignore the very significant contribution he has made over 10 years, particularly as a support worker for adults with learning disabilities.'

7. The judge acknowledged the public interest in the maintenance of effective immigration controls but concluded this was satisfied because the claimant satisfied the requirements of the immigration rules. The appeal was allowed with reference to article 8 of the 1950 Convention.

8. The Secretary of State applied for permission to appeal to the Upper Tribunal. It was contended that the judge had erred in law by failing to give adequate reasoning. The judge had acknowledged that the claimant had failed to provide background evidence as to what obstacles he would face on return. It was contended that the judge erred in finding the appellant would be homeless, by failing to take into account that the claimant had family support in the UK and in Zimbabwe, and the appellant is the director of a business in the UK. No evidence had been provided to indicate that the claimant would not be financially supported by his family or from the business. The judge had noted that the appellant had developed a skill set in the UK which would assist if returned to Zimbabwe and it was unclear how the judge

had reached a conclusion that the appellant would be homeless and would face very significant obstacles to integration. Permission to appeal was granted.

Error of Law

9. On 15 October 2018 I heard submissions from both parties in relation to error of law and concluded that the judge's decision must be set aside. Full details of the application for permission, the grant of permission, the submissions made by the parties, and my conclusions are contained in my error of law decision dated 16 October 2018, promulgated on 23 October 2018. A brief summary of my reasons for setting aside the decision is set out below.

10. I found the judge erred in relying upon EM (Zimbabwe) at paragraph 36 which relates to a person who has demonstrated that they are not reasonably likely to have any family or other support and who would be returning to a high-density area of Harare. The judge had failed to take into account that the appellant does have some family in Zimbabwe, at least a cousin, and friends, and his partner has family who could provide some support in reintegration.

11. There was no consideration of whether the claimant's family in the UK could offer financial support. He is the director and shareholder of the business. The judge did not give adequate reasons as to why the high threshold in paragraph 276 ADE (1) (vi) was met, particularly bearing in mind the guidance given in Treebhawon [2017) UKUT 00013 (IAC) to the effect that mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied are unlikely to satisfy the test of very significant obstacles in paragraph 276 ADE.

12. Having found that the judge erred in failing to give adequate reasons for conclusions on paragraph 276 ADE (1) (vi) I found this affected the proportionality exercise carried out with reference to article 8, particularly because in carrying out that exercise the judge placed weight upon the fact that the claimant could satisfy the immigration rules, which is relevant when considering the public interest.

Re-making the Decision

13. At the resumed hearing the claimant attended. He confirmed that he had no difficulty in speaking and understanding English. He further confirmed that he did not have legal representation and that he wished to proceed without representation. I was satisfied, in the circumstances, that this was appropriate. I explained to the claimant the purpose of the hearing and he acknowledged that he had received my error of law decision. He had no further documentary evidence to submit.

14. I confirmed that I had the bundles of documents that had been submitted by both parties before the FTT. Mr Jarvis provided a copy of a determination that related to the claimant with reference number OA/51563/2007 promulgated on 11 April 2008. This was the decision allowing the claimant's appeal against refusal of entry clearance.

15. The claimant indicated that he would be giving oral evidence and he would not be calling any witnesses.

16. The claimant then gave his oral evidence which I have recorded in full in my record of proceedings and will not reiterate here. In very brief summary the claimant explained that he has family and friends in the UK. He has lived here continuously since 2008. He has built up relationships. It would be very hard for him to reintegrate in Zimbabwe. The situation in Zimbabwe has deteriorated. The claimant's life is now in the UK.

17. The claimant was cross examined and all questions and answers are recorded in my record of proceedings and it is not necessary to reiterate them. If relevant I will refer to the oral evidence when I set out my conclusions and reasons. It is appropriate to record that the claimant when answering questions put by Mr Jarvis disclosed that prior to coming to the UK he had not in fact been living in Harare but had been living in Masvingo which he described as being a distance of 200 km away from Harare. The claimant had lived in Masvingo since he was 13 years of age. He would sometimes visit an aunt in Harare during holidays. That aunt now lives in the outskirts of Harare.

18. When I was satisfied that the claimant had given all the evidence that he thought relevant I heard oral submissions on behalf of the Secretary of State.

19. Mr Jarvis relied upon the decision to refuse leave to remain dated 18 September 2017. I was asked to note that the claimant had accepted in evidence that he had work experience in Zimbabwe before coming to the UK, working in a warehouse, and as a car mechanic. In the previous determination, allowing the claimant's appeal, the claimant was described as living in comfortable circumstances. At that time he was sponsored by an aunt resident in the UK who was also providing him with financial support.

20. The claimant had given evidence that he had invested £10,000 in setting up his business with his brother. The reference by the FTT to EM (Zimbabwe) was an error because if returned to Zimbabwe the claimant could return to his home area which was Masvingo. I was asked to note that the claimant had not been involved in politics and did not claim to be at risk.

21. I was asked to find that the claimant had not discharged the burden of proof in relation to paragraph 276 ADE (1) (vi), and there were no exceptional circumstances which would justify allowing the appeal with reference to article 8 of the 1950 Convention.

22. I then heard representations from the claimant. He explained that his aunt who had provided him with some financial support when he was in Zimbabwe could no longer do so because her circumstances had changed. He asked that I take into account the good work that he had done while in the UK in that he had worked as a carer. I was asked to take into account the length of time the claimant had been in the UK and to accept that his life was now in the UK and not in Zimbabwe.

23. I reserved my decision.

My Conclusions and Reasons

24. Only one ground of appeal is open to the claimant and I must decide whether the Secretary of State's decision is contrary to section 6 of the Human Rights Act 1998. The claimant relies upon article 8 of the 1950 Convention in relation to his private life in the UK. In deciding this appeal I adopt the balance sheet approach recommended at paragraph 83 of Hesham Ali [2016] UKSC 60.

25. The burden of proof lies on the claimant to establish his personal circumstances in the UK and to establish that article 8 is engaged. It is for the Secretary of State to establish the public interest factors weighing against the claimant. The standard of proof is a balance of probabilities throughout.

26. I find that article 8 is engaged on the basis of the claimant's private life. I set out the factual matrix below.

27. The claimant has lived in the UK continuously since arriving on 30 August 2008. His purpose in coming to the UK was initially to study as a dental nurse. The claimant is now 34 years of age. He has three adult siblings residing in the UK. He is not dependent on those siblings and he has not established family life with them that would engage article 8. Following the breakdown of his marriage the claimant is in a new relationship although he said in his oral evidence that he does not live with his new partner, and in any event I cannot take that relationship into account for the reasons given earlier in this decision.

28. The claimant has worked as a carer in the UK. He has set up a business with his brother into which £10,000 was invested. I accept his oral evidence that he receives an income of approximately £15,000 per year from the business.

29. Prior to coming to the UK the claimant lived and worked in Masvingo for approximately 11 years. He stated in his witness statement that he had experience working as a car mechanic, and evidence given at his previous appeal hearing indicated that he worked in a warehouse and shop and as a driver. A judicial finding was made in the previous determination that the appellant lived in comfortable circumstances in Zimbabwe. I accept the appellant's evidence that he has never been involved in politics in Zimbabwe and he does not claim to be at risk in Zimbabwe.

30. Having set out the factual matrix I now consider whether the appellant can satisfy the immigration rules which is a relevant but not determinative consideration. It is not suggested that the claimant can satisfy the requirements of appendix FM in relation to family life and I find that to be the case.

31. The claimant relies upon paragraph 276 ADE (1) (vi) which means that he must prove on a balance of probabilities that there are very significant obstacles to his integration in Zimbabwe. In considering this I follow the guidance in Treebhawon which has been summarised earlier in this decision.

32. In relation to integration I follow the guidance in Kamara [2016] EWCA Civ 813. At paragraph 14 it is explained that there must be a broad evaluative judgement. It must be considered whether an individual is enough of an insider in terms of understanding how life in the society in the country of return is carried on. The individual must have the capacity to participate in life in that country and have a reasonable opportunity to be accepted there and operate on a day-to-day basis. The individual must be able to build up within a reasonable time a variety of human relationships to give substance to their private or family life.

33. The claimant is a citizen of Zimbabwe. He has lived the greater part of his life in that country. He would not have any linguistic difficulties if he returned. There are no relevant health issues. The claimant is in good health and does not claim that there are any medical conditions which could not be treated in Zimbabwe.

34. Prior to moving to the UK the claimant was living in comfortable circumstances and had employment. He has not been involved in politics and is not at risk. He maintains contact with a distant cousin who resides in Masvingo.

35. The claimant now has increased employment skills having been resident in the UK since 2008. I find no satisfactory reason has been given as to why the claimant could not obtain employment in Zimbabwe. No satisfactory evidence has been provided to indicate that the claimant could not withdraw funds from the business he has set up, or receive some financial support from family in the UK.

36. The evidence does not indicate that the claimant would be homeless or destitute if he returned to Zimbabwe. The claimant would be eligible for support from the Home Office Voluntary Returns Service. I conclude that the claimant has not proved that there would be very significant obstacles to his integration in Zimbabwe.

37. Because the claimant cannot satisfy the immigration rules does not mean that his appeal must fail. I must consider whether there are any exceptional circumstances which would result in unjustifiably harsh consequences if he had to return to Zimbabwe.

38. When considering proportionality and the public interest I must have regard to the considerations listed in section 117B of the 2002 Act. The maintenance of effective immigration controls is in the public interest. I find it is appropriate to place weight upon the fact that the appellant cannot satisfy the immigration rules in relation to family and private life.

39. It is in the public interest that a person seeking leave to remain can speak English and is financially independent. I accept that the appellant can speak English and is financially independent and these are neutral factors in the balancing exercise.

40. Section 117B provides that little weight should be placed upon a private life established when an individual has been in the UK with a precarious immigration status. The claimant has always had a precarious immigration status because he has

only ever had limited leave to remain. I find that I am bound to attach little weight to the private life that he has established for that reason.

41. Having carefully considered the evidence, I do not find that there are any exceptional circumstances which would result in unjustifiably harsh consequences if the claimant had to return to Zimbabwe. If the claimant wishes to make an application in relation to his new relationship, such an application will have to be made to the Secretary of State.

42. In my view the weight that must be attached to the public interest in maintaining effective immigration control outweighs the weight to be attached to the appellant's wishes to remain in the UK. The decision of the Secretary of State is proportionate and does not breach article 8 of the 1950 Convention.

Notice of Decision

The decision of the FTT involved the making of an error of law and is set aside. I substitute a fresh decision.

The appeal of the Secretary of State is allowed.

I dismiss the appeal of the claimant.

No anonymity direction is made.

Signed Date 10 February 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

I have dismissed the claimant's appeal and therefore there can be no fee award.

Signed Date 10 February 2019

Deputy Upper Tribunal Judge M A Hall