IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17546/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 October 2014	**On 30 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER – PRETORIA

Appellant

and

O O M
(ANONYMITY DIRECTION DISCHARGED)

Respondent/Claimant

Representation:

For the Entry Clearance Officer: Mr E Tufan, Specialist Appeals Team
For the Respondent/Claimant: Mr K Alim, Counsel instructed by Yaqub & Co Solicitors

DECISION AND REASONS

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer from the decision of the First-tier Tribunal allowing on Article 8 grounds the claimant's appeal against the decision by an Entry Clearance

Officer to refuse to grant her entry clearance as the spouse of a refugee. The First-tier Tribunal made an anonymity direction, but there was no obvious justification for this. I do not consider that the claimant or her spouse (who has been recognised as a refugee and so no longer faces the threat of an enforced return to Zimbabwe) require anonymity for these proceedings in the Upper Tribunal.

2. The claimant is a national of Zimbabwe, whose date of birth is 11 April 1975. Her application for entry clearance from South Africa was sponsored by Ellias Magwaza, whom she married in Zimbabwe on 23 April 2000. The sponsor arrived in the United Kingdom on 5 December 2001 travelling on his own passport, was granted six months leave to enter as a business visitor. Following the expiry of his visa, he failed to regularise his stay and remained as an overstayer. He claimed asylum on 25 October 2005. The application was refused on 9 December 2005, and his appeal against the refusal of asylum came before Judge John Pullig sitting in the First-tier Tribunal at Hatton Cross on 13 January 2006. Judge Pullig rejected his claim to be involved with the MDC, and did not believe that the adverse attention of ZANU-PF had compelled him to leave the country in 2001. However, he allowed the appeal on the ground that the claimant would face a real risk of persecution as an involuntary returnee to Zimbabwe.

3. Reconsideration of the decision was ordered by Mr Justice Burton on 13 February 2009. The appeal came before Judge Verity on 10 November 2009 for a rehearing, and she dismissed the appeal. The matter ended up in the Court of Appeal, which ordered that the appeal be remitted to the Upper Tribunal. On 19 November 2012 Upper Tribunal Judge McGeachy allowed the sponsor's appeal against the refusal of asylum.

4. The sponsor was granted limited leave to remain as a refugee in consequence of Judge McGeachy's ruling, and shortly thereafter he sponsored the claimant's application to join him in the UK.

5. The application was refused on 7 August 2013. The Entry Clearance Officer in Pretoria was not satisfied that the marriage was genuine or subsisting. This was because of a lack of evidence of contact or support between 2001 and 2010; and thereafter the amount of contact or financial support had been minimal.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. The claimant's appeal came before Judge Harmes sitting at Columbus House in Newport on 9 July 2014. Both parties were legally represented. The judge received oral evidence from the sponsor. In a subsequent determination, he held at paragraph 21 that at the time of the initial decision and the subsequent ECM review there was insufficient evidence to show that the claimant and the sponsor were in a genuine relationship:

> Based on the evidence presented I find as a fact that they simply have not proved that relationship on the balance of probabilities. The [claimant]

> therefore fails under the Immigration Rules, and the decision was in accordance with the law.

7. The judge went on to address an alternative claim under Article 8 ECHR. He observed that since the decision by the ECO and ECM, further facts have been presented. He said he was entitled to take these into account to determine whether the relationship is (present tense) genuine and subsisting. The sponsor and the claimant had been reunited since he was able to travel outside the UK. They had met in Pretoria, and had renewed their marital vows on 23 February 2014. It was accepted by the Entry Clearance Officer that the sponsor had been prevented from doing so from the time of his entry to the UK until 9 December 2013, when he was finally given a travel document after his asylum claim eventually succeeded. The judge continued as follows in paragraph 23:

> > Having had the benefit of hearing and seeing him give his evidence, something denied to the ECO and ECM, for my part I found his evidence to be honest and open. His answer to the personal questions he was asked I found to be genuinely emotional and heartfelt. In particular I found his answers at paragraphs 12 and 13 above to have led me to conclude that he has suffered considerably from the separation for many, many years while awaiting the result of his immigration proceedings. During that time he was unable to travel because he had no documents to do so ... I find as a fact the marriage is genuine and the [claimant] and sponsor do intend to live and stay together if reunited.

8. The judge went on to dismiss the appeal under the Immigration Rules, but to allow the appeal under Article 8.

The Grant of Permission to Appeal

9. On 5 September 2014 First-tier Tribunal Judge M J Gillespie granted the Entry Clearance Officer permission to appeal to the Upper Tribunal. He observed in passing that the Entry Clearance Officer did not appeal against the finding that a genuine and subsisting relationship existed between the couple as at the date of the appeal hearing. However, it was arguable that in his favourable findings concerning the Article 8 claim, the First-tier Tribunal Judge engaged in a freewheeling assessment of the circumstances of the claimant without regard to the principles in **Gulshan**, **Nagre** and **MF (Nigeria)** and in doing so made an error of law.

The Hearing in the Upper Tribunal

10. For the purposes of the hearing in the Upper Tribunal, Mr Alim relied on an extensive Rule 24 response which had been settled by his instructing solicitors. After hearing submissions from both parties, I ruled that the decision of the First-tier Tribunal was vitiated by a material error of law such that it should be set aside and remade. My reasons for so finding are set out below. I then invited Mr Alim in to tender the sponsor as a witness for the purpose of remaking the decision. The sponsor was cross-examined by Mr Tufan, and he answered the questions for clarification

purposes from me. In his closing submissions on behalf of the Entry Clearance Officer, Mr Tufan invited me to dismiss the appeal. In reply, Mr Alim pointed out that Mr Tufan had not cross-examined the sponsor on aspects of his evidence, including his evidence that he had been sending money to his wife on a regular basis prior to the refusal decision.

Reasons for Finding an Error of Law

11. The judge misdirected himself in law at paragraph 19 of his determination, where he held that Section 85(5) of the Nationality, Immigration and Asylum Act 2002 did not apply to an Article 8 claim. The judge wrongly proceeded on the premise that for the purposes of the Immigration Rules he could only consider the circumstances appertaining at the date of the decision to refuse entry clearance; whereas for the Article 8 claim, he could consider the circumstances appertaining at the date of the hearing. But Section 85(5) applies no less to an appeal against the refusal of entry clearance on Article 8 grounds than it does to an appeal under the Immigration Rules against the refusal of entry clearance.

12. The judge's incorrect starting point generated a series of further material errors. Most notably, the judge wrongly treated the postdecision evidence as only being relevant to the Article 8 claim, and as being inadmissible to the claim under paragraph 352(a) of the Immigration Rules. As was held in **Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 0040 (IAC)**, a decision of a presidential panel, postdecision visits by a sponsor to his spouse are admissible in appeals to show that the marriage is subsisting.

13. Having found that the marriage was genuine and subsisting as at the date of the hearing, the judge failed to ask himself the question whether it was more likely than not that the relationship was *also* genuine and subsisting at the date of decision. The implication of his findings at paragraph 23 is that the judge would have answered this question in the claimant's favour. However, he wrongly found against the claimant under the Rules on the ground that there was insufficient evidence in existence at the date of the initial decision and on the date of the subsequent ECM review. If this has been a points-based system appeal, such considerations would have been highly relevant. But they were wholly irrelevant to the task which the judge was required to perform which was to assess whether the marriage was genuine and subsisting at the date of decision by reference to the totality of the available evidence, which included relevant postdecision evidence.

14. Although there was no cross-appeal by the claimant against the dismissal of his appeal under the Rules, the errors in the judge's approach are "**Robinson** obvious" ones which it is proper for the Upper Tribunal to take of its own motion.

15. For the sake of completeness, I agree that the judge's approach to Article 8 was also flawed for the reasons given by Judge Gillespie when granting

permission to appeal. However, as I have indicated earlier in this error of law ruling, the judge should not have been entertaining the Article 8 claim in the first place.

The Remaking of the Decision

16. The pre-decision evidence is considerably stronger than is suggested by Judge Harmes' determination. The bundle for the hearing in the First-tier Tribunal contained some eighteen pages of what is described in the index as email communications, but which are in fact text exchanges between the claimant and the sponsor through an app knows as "WhatsApp". The printouts begin on 15 December 2012, which is some six months before the date of decision. The content of the communications is entirely consistent with a genuine and subsisting marital relationship. The sponsor gave credible, and unchallenged, evidence that he had been engaging in similar communications with his wife long before mid-December 2012, but that their earlier communications have been automatically deleted. So he was only able to print off her exchanges from mid–December 2012.

17. Additional evidence of the marriage being genuine and subsisting prior to the date of the refusal decision is to be found in the determination of Judge Pullig. He refers in passing to a letter from the claimant to the sponsor which is addressed to "beloved husband". It is also apparent from his determination that the sponsor was in communication with the claimant in October 2005, as the judge refers to a letter from the claimant dated 21 October 2005 which is addressed to the sponsor. She also sent a letter dated 29 October 2005 to the claimant's solicitors by way of support for the claimant's asylum claim. In short, the evidence that can be gleaned from Judge Pullig's determination about the status of the relationship between the claimant and the sponsor in early 2006 is supportive of the relationship being genuine and subsisting in 2005 and 2006, rather than it having withered away.

18. The appellant's bundle also contains two signed letters from third parties, who give their mobile telephone numbers. They testify to having conveyed gifts from the sponsor to the claimant over the years. Mr Shoniwa says that on two trips he has made to Zimbabwe over the past years the sponsor has given him an assortment of gifts consisting of clothes, shoes, mobile telephone and chocolates to give his wife Olga. He usually leaves them at their home in the city of Kwekwe in Zimbabwe, as the appellant is currently working in South Africa. Ms Muklukane says that every year when she visits South Africa, the sponsor will give her money and some presents for Olga. She attaches her South African visa and passport stamps which show how many times she has been to South Africa.

19. Mr Tufan submits that if the marriage had been genuine and subsisting at all material times, the sponsor would have made greater efforts to facilitate his wife's entry to the UK as a visitor or student. The sponsor agreed in cross-examination that at the time when he entered the country in 2001, there were no visa requirements. So there is some force in the

argument that in 2001 it would have been relatively easy for the claimant to have followed the sponsor to the UK. But once the sponsor had claimed asylum, he could not realistically be expected to sponsor his wife to join him in the United Kingdom as a visitor or student. The claimant would not have been granted entry clearance while her husband's status was uncertain and when she could not demonstrate that she had an adequate incentive to return to Zimbabwe. I do not consider the credibility of the relationship at the date of the refusal decision is called into question by the sponsor's prior failure to attempt to achieve the impossible.

20. Finally, I see no reason to deprive the claimant of the benefit of the positive findings of fact made by the FTT judge at paragraph 23 of his determination.

21. Accordingly, I find that the claimant has discharged the burden of proving that at the date of decision the marriage was genuine and subsisting, and that each of the parties to the marriage intended to live permanently with the other as husband and wife respectively. As this was the only issue under the Rules, I find that the claimant succeeds in her appeal under the Rules. It is not therefore necessary for me to consider an alternative claim under Article 8 ECHR.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal against the refusal of entry clearance is allowed under the Rules.

Signed Date: **30 October 2014**

Deputy Upper Tribunal Judge Monson