Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19286/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 June 2017	**On 22 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

[N P]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Oshunrinade, Solicitor
For the Respondent: Mr E Tufan, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Mailer in which he dismissed the appellant's appeal against the

respondent's refusal of her application for leave to remain on Article 8 ECHR grounds.

2. The appellant is a citizen of Zimbabwe born on [ ] 1983. She claimed to have entered the UK on 8 December 2003 on a false South African passport. She applied for asylum a few months after arrival on 2 September 2004. Her claim was refused on 26 October 2005. She did not appeal against that refusal as she was not advised by anyone to do so.

3. In July 2005 she met her British spouse, [RM], and they commenced a relationship. They were engaged but did not get married until 2014. They commenced cohabitation in early 2006. They started trying for their own family but she unfortunately lost all her pregnancies.

4. Since she started living with her British spouse, he has maintained and accommodated her. In 2009, she was requested by the Home Office to complete an immigration mode of entry questionnaire and to forward passport photographs. She complied with that request and was advised that her application for asylum made in 2004 was being considered under the older asylum cases called "Legacy Casework". She was advised not make any further application until she received an outcome in relation to the Legacy case. After waiting for a long time, she instructed another firm of solicitors. By this time she had been married to [RM] and had lived as a married couple rather than partners. The appellant produced a certified copy of an entry of marriage showing that their marriage was solemnised before the Brighton & Hove Registry on 2 June 2014.

5. Her solicitors then advised that she could apply for leave to remain on the basis of her marriage and subsisting relationship with a British citizen. On 11 February 2015 she submitted her application, which was refused on 7 May 2015.

6. The appellant contended that it would be difficult for her spouse to relocate to live with her in Zimbabwe as he has never lived there. He does not speak the language and has no family there. His entire family, including his parents, lived in the UK. She has lived in the UK continuously since 2003. Her only parent, namely her mother, passed away in 2006. She does not have anyone or anywhere that she could call her own in Zimbabwe. Relocating there would bring extreme hardship on her husband and as such could not be justified.

7. She asserted that her long residence here, coupled with the length of her relationship/marriage to a British citizen represented sufficient exceptional circumstances to justify being granted leave to remain in the UK.

8. In [ ] 2015 her husband had a child, [EM], out of wedlock, with another person. The child was now about 1 year 7 months old. Her husband has played his role in her life as her father. He was not in a relationship with the child's mother, but was able to have the child spend time at their home each week. The child's mother is not

"hands-on" and is happy to live her life as a single person while she and her husband do all the work raising the child. She feeds the child and takes her out to different places. She stays with her when her husband is not around or has gone to work. The presence of the child in their lives makes it difficult for them to relocate to Zimbabwe. The child and her husband are bonded. She seriously doubted whether he would be able to leave the child in the UK and relocate with her in Zimbabwe. She too has bonded with the child. She and her husband are still trying to conceive.

9. The appellant said that the presence of the child in their lives constituted sufficient exceptional circumstances, making her removal unjustifiable.

10. The child's birth certificate showed that the child was born on [ ] 2015. [RM] and [CB] are recorded as the parents.

11. The appellant said in oral evidence that she took the child as her own. They have her five days a week. The child's mother works and is busy. The child stays with them from Monday to Friday. She did not know that [CB] was three months pregnant at the date of their marriage.

12. It was accepted by the appellant's solicitors that the appellant's husband could not meet the specified gross annual income of £18,600 as he was working reduced hours while studying to increase his vocational skills. In oral evidence he said he worked for an agency. He was a painter, decorator and bricklayer. He has worked for nine years. He earns about £11 per hour. He can earn between £350 and £400 a month.

13. The judge noted that in the appellant's application to the Home Office, the application was based on her family life as a partner. She stated that she did not have a parental relationship with a child who was British. She signed her application on 11 February 2015, although it was sent to the respondent as an enclosure in her solicitor's letter dated 20 March 2015.

14. The judge noted that although the appellant's stepdaughter, [EM] was born on [ ] 2015, there was no reference to [EM]'s birth in the accompanying representations. The submissions set out in the solicitor's letter were to the effect that exception EX.1 applied as the appellant had a genuine and subsisting relationship with her partner and there would be insurmountable obstacles to family life continuing outside the UK. Her solicitors asserted that any suggestion that because the appellant and her partner have no children, they somehow fell short of the Immigration Rules or that there were no insurmountable obstacles to her partner moving to Zimbabwe, would be inconsistent with the factual circumstances of their situation.

15. The judge also noted that the representations at that stage were confined to the relationship between the appellant and her husband. With regard to the sponsor, it was stated that he was a British born citizen who has had all of his work, family and studies in the UK. His mother and sister, his only family members, are British citizens who also live here. His father is deceased. He has no experience of life

outside the UK. This was not a matter of preference by the appellant's partner, but genuine risk and concern.

16. The judge's findings are set out at [75]-[111].

17. The judge found that although there was a discrepancy as to the amount of time spent each week by the child with the appellant and her husband, he accepted that [EM] does spend a significant amount of time with both the appellant and [RM]. He was also satisfied from the documentary evidence that [RM] could not satisfy the minimum income threshold requirements under the Rules, namely £18,600 per year.

18. The judge found that the child was still very young. The appellant and her husband have provided free childcare to her mother. This has enabled [EM]'s mother to continue working, which is on a shift basis. She sometimes works nights as well as in the day. The judge found at paragraph [78] that it would be in the child's best interests to continue the pattern of shared responsibility with the appellant and her husband and with her mother.

19. In assessing whether there were insurmountable obstacles preventing the appellant from continuing her relationship in Zimbabwe, the judge considered that there were options available to the appellant and her husband. He could decide whether to accompany her for any period of time to Zimbabwe. He took into account the concern that permission would not be given to [EM]'s mother to join him there, even for short visits. He did not find it unlikely that [EM]'s mother would agree to this.

20. The judge noted it has not been asserted that the appellant and [RM] would not be able to obtain employment in Zimbabwe. There has been no research undertaken as to his prospective employment opportunities for either of them.

21. The judge also found that [RM] would also be able to return to the UK in order to visit and be with his daughter. He could also continue their relationship via modern means of communication, including Skype and other applications.

22. The judge found that a further option was that [RM] could stay for a period with the appellant while she made an application for entry clearance. Although the time it would take for a decision to be made is not given, he accepted that it is likely to be in the region of two to three months. Although the appellant has referred to the attempts she has made to conceive her own child, there was no evidence that she was currently seeking any medical treatment or advice regarding her repeated miscarriages.

23. In the light of the evidence relating to both the appellant and her husband jointly, the judge found that there would not be insurmountable obstacles in the circumstances.

24. The judge found that the appellant has spent the majority of her life in Zimbabwe. She has social and cultural ties to Zimbabwe. Consequently, he found that there would not be very significant obstacles to her integration into Zimbabwe.

25. The judge had regard to the respondent's contention that there were no exceptional circumstances found in her case. He noted that this was because the respondent was not referred to the fact that the appellant's husband had become the father of a British child at the end of January 2015. No submissions or representations were made on the basis of the recent birth of the appellant's husband's daughter. The position of [EM] was raised as a significant circumstance in the appellant's appeal. The judge found that this does constitute a basis upon which a grant of leave outside the Immigration Rules might be warranted. Accordingly, he considered the appellant's application under the provisions of Article 8 of the Human Rights Convention. He had regard to the best interests of the child as a primary factor in the assessment as well as considering the effect of the appellant's removal to Zimbabwe on her and her husband. The judge had regard to relevant case law.

26. The judge found at [96] that it was not disputed that the appellant enjoys family life with her husband in the UK. They have remained in a subsisting relationship since their marriage. Her husband is a British citizen and they both provide care for his 19 month old child for several days during the week. [RM] is employed and continues to be so. At the moment his annual salary is less than the minimum income required under the Rules. He currently works on a reduced hours basis.

27. The judge then had regard to the decision in **R (on the application of Chen) v SSHD IJR [2015] UKUT 00189 (IAC)** and **Razgar v SSHD [2004] UKHL 27**.

28. The judge answered the first four questions of **Razgar** in the affirmative. He proceeded to consider question 5, where he was required to conduct a balancing exercise under Article 8. In considering the proportionality of the proposed interference, he had regard to the public interest considerations under Section 117B of the 2002 Act.

29. The judge found that the appellant entered the UK in December 2003 and has remained here ever since. She has been supported by her husband. There has been no evidence of any recourse to public funds. He found that their private and family life enjoyed in the UK has been unlawful and precarious, since shortly after her asylum application was refused on 26 October 2005. She did not appeal that decision. She met her future husband in July 2005 at a time when she did not have any immigration status. Her continued presence in the UK has always been dependent upon her obtaining a further grant of leave. If she returned to Zimbabwe, even for a temporary period, that removal would interfere with her enjoyment of family and private life.

30. The judge also considered whether an application for entry clearance from Zimbabwe would be granted. He found, for the reasons already given, that the

appellant would not currently succeed in an application. She cannot currently meet the financial requirements under Appendix FM and FM-SE of the Rules.

31. The judge did not regard their reliance on cases including **Chikwamba** to be apposite in the circumstances. Their return to Zimbabwe would not be for the mere sake of formality. The appellant would have to demonstrate that she meets the relevant requirements under the Rules, including the production of mandatory specified evidence. [RM] will need to find employment so as to meet the relevant requirements under Appendix FM and FM-SE. He has not contended that he would not be able to find such employment. Such employment may interfere with his studies, but it is a matter of choice. As part of the assessment the judge also found that there were options available to [RM] which he had already set out from [84]-[86].

32. Having regard to the circumstances as a whole, the judge found that the contemplated interference with the appellant's, her husband's and [EM]'s right to family and private life was not disproportionate.

33. Permission was granted to the appellant on the basis that at [111] the judge specifically referred to finding the contemplated interference with the appellant's, her husband's and [EM]'s right to family and private life was not disproportionate. However, the judge did not refer to [EM] from [103]-[110] inclusive. It was arguable that the allusion to paragraphs [84]-[86] was insufficient in applying the conclusions to be drawn from the application of Section 55 and in considering the position of the child.

34. Mr Oshunrinade submitted that the judge erred in law because having concluded at [78] that "It would be in the child's best interests to continue the pattern of shared responsibility with the appellant and her husband, and with her mother", the judge should have found that the appellant has a genuine relationship with a British child. He should therefore have concluded that the appellant should be allowed to remain in the UK to continue looking after her stepdaughter.

35. Mr Oshunrinade further submitted that in carrying out the proportionality assessment, the judge did not consider [EM] who is a British child. If he had done so the judge would have found that it would not be disproportionate for the appellant to return to Zimbabwe, particularly in the light of his finding at [78].

36. Mr Tufan submitted that the judge made several observations as to how the child was not mentioned at all to the Secretary of State in her application or representations. The judge also found that the appellant through her husband was involved with the care of the child for a number of days in the week. Mr Tufan however submitted that Section 117B(6) refers to an applicant who has a genuine and subsisting "parental relationship" with a qualifying child. He submitted that there was no evidence of the appellant's parental relationship with the child for paragraph 117B(6) to come into play.

37. He submitted that at [96] the judge found that both parents cared for the child for several days of the week. Mr Tufan questioned whether the appellant can be regarded as the child's stepmother. He submitted that the judge's findings do not amount to a "parental relationship". The judge notwithstanding considered the matter under a freestanding Article 8. The evidence had to be compelling. Mr Tufan submitted that strictly the judge erred because he did not consider the best interests of the child.

38. Mr Tufan submitted that the decision in **Chen** was upheld by the Court of Appeal in **Agyarko & Ors [2015] EWCA Civ 440**. Mr Tufan submitted that there was no evidence from a social worker as regards the child's best interests. He submitted that the child's best interest is to be with her parents. He submitted that the judge did not apply the ratio that it would be disproportionate, if a child is involved, for the appellant to return to Zimbabwe to make an entry clearance application.

39. Mr Oshunrinade in reply submitted that the witness statement from the appellant and the oral evidence provided led the judge to believe that there was a parental relationship between the appellant and the child. Even though the judge did not deal with the relationship between the appellant and the child, the judge used the word "care" to refer to their relationship.

40. Mr Tufan relied on the decision in **R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC)**. Mr Tufan submitted that in head note 2 step-parent relationship was defined as stepping "into the shoes" of a child's mother.

41. I find that the judge erred in law in his assessment of Article 8. At [102] the judge correctly directed himself that in proceeding to consider question 5 of **Razgar**, he is required to conduct a balancing exercise under Article 8. From [103]-[110] there was no reference by the judge to the British child [EM], the relationship between [EM] and the appellant and her father and the child's best interests in all of these relationships. Accordingly, I find that the judge erred in his conclusion at [111] that the contemplated interference with the appellant's, her husband's and [EM]'s right to family and private life was not disproportionate.

42. Consequently, the judge's decision under Article 8 cannot stand. I remake the decision. This is because Mr Oshunrinade submitted that this was an issue that I could determine if I found that there was an error of law.

43. I find that the judge rightly made several observations as to how the child was not mentioned at all in the appellant's application to the Secretary of State or in her representations. This was despite the fact that when the appellant signed her application on 11 February 2015, [EM] was 1 month old; and when the application was sent to the respondent as an enclosure in her solicitor's letter dated 20 March 2015, the child was 2 months old. The child only became part of the story at the

hearing which took place on 30 August 2016, by which time the child was about 20 months old.

44. Mr Tufan submitted that Section 117B(6) does not come into play because this paragraph refers to "parental relationship". Paragraph 117B(6) states as follows:-

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

45. The issue is whether the appellant qualifies as a parent who has a genuine and subsisting parental relationship with [EM], who is a qualifying child because she is a British national. **RK** which, in its head note, defines a step-parent as one who steps into the shoes of a parent.

46. On the evidence in this case I do not find that the appellant has stepped into the shoes of the child's mother. The judge found at [77] that the appellant and her husband provided free childcare to the child's mother. This has enabled [EM]'s mother to continue working, which is on a shift basis and sometimes works nights as well as in the day. This finding, which has not been disputed, is not evidence that the appellant has stepped into the shoes of the child's mother. I find that by providing free childcare to the child's mother, the appellant is merely providing a service that is convenient to the mother. It enables the mother to work. If the appellant were not around, the child's mother would have to find a childminder to provide that care while she was at work, with the child's father playing a part in her care.

47. Consequently, I find that Section 117B(6) does not come into play in this case.

48. I now consider the appellant's case outside of the Immigration Rules under Article 8. I find, as did the judge, that the first four questions of **Razgar** can be answered in the affirmative. Therefore, there remains the conduct of a balancing exercise under Article 8.

49. I shall adopt the judge's findings of fact which have not been disputed. They are that the appellant enjoys a family life with her husband in the UK. They have remained in a subsisting relationship since their marriage. Her husband is a British citizen and they both provide care for his 19 months old child for several days during the week.

50. The judge found at [78] that it would be in the child's best interests to continue the pattern of shared responsibility with the appellant and her husband and with her mother. I do not however find that this shared pattern amounts to exceptional

circumstances for the purposes of Article 8. If the appellant were not here, the child's care would be continued by the child's father, that is the appellant's husband and the child's mother.

51. The appellant entered the UK in December 2003 and has remained here unlawfully ever since. She formed a relationship with her husband in the knowledge that she had no right to be in the United Kingdom and at a time when her circumstances were precarious. I am not persuaded that her relationship with the child by way of childcare for several days of the week amounts to exceptional circumstances, such that she ought to be granted leave to remain outside the Immigration Rules.

52. Accordingly, I find that the child's best interests are to remain with her mother and her father in the UK.

53. I find that the appellant's removal would not be a disproportionate interference in her family and private life.

Notice of Decision

54. I dismiss the appellant's appeal.

55. No anonymity direction is made.

Signed Date: 22 September 2017

Deputy Upper Tribunal Judge Eshun