Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07400/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2019	**On 13 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDWIN MASUNDA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. C. Avery, Senior Home Office Presenting Officer
For the Respondent: Mr. P. Haywood, Counsel instructed by Cahill De Fonseka Solicitors

DECISION AND REASONS

1. In a decision promulgated on 29 January 2019, I set aside the decision of the First-tier Tribunal to be remade. As in that decision, I refer to Mr. Masunda as the Appellant, and to the Secretary of State as the Respondent, reflecting their positions as they were before the First-tier Tribunal.

The hearing

2. I heard oral evidence from the Appellant and from his wife, the Sponsor, Mrs. Kirsty Masunda. Both representatives made oral submissions. I reserved my decision.

3. I have taken into account the documents in the Respondent's bundle (92 pages), the Appellant's bundle (158 pages), and the skeleton argument provided by Mr. Haywood. I was provided with copies of the cases of Mhlanga [2012] EWHC 1587 (Admin), JM (Zimbabwe) [2017] EWCA Civ 1669, and Agyarko [2017] UKSC 11.

Burden of proof

4. The burden of proof lies on the Appellant to show that, at the date of the hearing, the Respondent's decision is a breach of his rights, and/or those of the Sponsor, to a family and private life under Article 8 ECHR. The standard of proof is the balance of probabilities.

Findings and conclusions

5. I make two observations at the outset. First, an additional issue was raised by the Appellant in the Upper Tribunal, which he had not raised in the First-tier Tribunal, regarding his ability to return to Zimbabwe. It was not argued before the First-tier Tribunal that the Appellant would not be able to return to Zimbabwe due to the policy of the Zimbabwean government in respect of return of their nationals, with reference to the cases of Mhlanga and JM (Zimbabwe).

6. Secondly, Mr. Avery made no reference to, or placed any reliance on, the Appellant's criminal record. This was not an issue in the reasons for refusal letter, as the convictions occurred after the decision. I find that it is significant that the Respondent is placing no weight on this element.

7. I found the Appellant and Sponsor to be honest and credible witnesses. They were not cross-examined, but they answered all questions put to them by Mr. Haywood, and were not evasive. Their evidence was consistent, and consistent with the documentary evidence. In particular, the Appellant has been open about his criminal conviction. I find that I can rely on the evidence of the Appellant and Sponsor.

Immigration rules

8. The Respondent refused the Appellant's application as a partner as he did not meet the eligibility status requirements or the English language requirements. The Respondent was not satisfied that the Appellant met the requirements of paragraph EX.1(b) as there was no evidence that there were any insurmountable obstacles to family life continuing in Zimbabwe.

9. It was not submitted that the Appellant could meet either the eligibility status requirement, or the English language requirement. In order to meet the requirements of paragraph EX.1(b), the Appellant must show that he has a genuine and subsisting relationship with the Sponsor, and that there are insurmountable obstacles to family life with the Sponsor continuing outside the United Kingdom.

10. Paragraph EX.2 states:

"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."

11. In respect of paragraph EX.1(b), it was submitted by Mr. Avery that there had been no change since the date of the First-tier Tribunal's decision. The Judge had found that there were no insurmountable obstacles to family life continuing outside the United Kingdom, and there had been no change to this position. However, as I have set out above, no reliance had been placed on the cases of Mhlanga or JM (Zimbabwe) at the hearing in the First-tier Tribunal, and therefore the Judge did not take this issue into account when considering whether there were insurmountable obstacles to family life continuing in Zimbabwe.

12. I have carefully considered these cases. At [11] of JM (Zimbabwe) it states:

"It has been the settled policy of the Zimbabwean government since 2002 that it will not grant ETDs to its nationals who do not wish to return."

The case went on to consider whether the Respondent could lawfully require an individual to tell Zimbabwean officials that he was willing to return voluntarily when he was not, and held that the Respondent could not do so.

13. The case of Mhlanga states at [19]:

"At para. 8 of the witness statement [filed on behalf of the Secretary of State] it is said that the Secretary of State is not presently in a position to remove persons to Zimbabwe who do not have a valid passport without their consent. This is because the Zimbabwean authorities will not agree to issue emergency travel documents to persons returning involuntarily."

14. In relation to the Appellant's reliance on JM (Zimababwe), Mr. Avery submitted that he was not sure that it was relevant to the test set out within EX.1(b) which was concerned with the integration into society once in the country. First, EX.1(b) is not so limited, and further I find that an appellant's inability to enter his country of origin cannot be considered other than an obstacle to family life continuing there. Mr. Avery did not submit that the situation was any different now to that outlined in Mhlanga.

15. The Appellant gave evidence that he did not wish to return to Zimbabwe. He said that he had nowhere to stay, had been away for a long time, and would not know what to do on his return. He said that his life was here consisting of the Sponsor and her extended family, as well as his own extended family members. I find that the Appellant lives with his older sister and her two children.

16. It was submitted by Mr. Haywood that the issue of voluntary returns to Zimbabwe had not gone away. The Appellant's passport had expired, and he would therefore

have to be taken to the Zimbabwean Embassy in order to obtain an emergency travel document ("ETD"). He would then have to make a declaration that he was willing to return to Zimbabwe, which is he not. The Respondent would have to compel him to sign a false declaration so as to be able to effect his removal. He submitted that, following JM (Zimbabwe), the Respondent had no statutory power to do this.

17. Mr. Haywood submitted, which I find must be the case, that the Respondent had been aware of this policy throughout the period of this application and appeal. This was clear from the cases of Mhlanga and JM (Zimbabwe). He submitted that the problem was the attitude of the Zimbabwean authorities, not the Appellant. For most places, if an individual did not want to return, this did not cause a problem. An ETD would be issued all the same, irrespective of an individual's wishes. This was not the case with Zimbabwe, and the Respondent could not expect, or force, the Appellant to lie to the authorities. He submitted that this was a significant point which went to the issue of whether the Appellant could conduct married life outside the United Kingdom.

18. I find that this is a significant issue which goes directly to whether or not the Appellant can conduct married life outside the United Kingdom. As I set out above, Mr. Avery did not challenge the situation as set out in Mhlanga and JM (Zimbabwe), and while I accept that the skeleton argument was not served until the morning of the hearing, he did not seek an adjournment. I find that it is significant that the Respondent did not challenge this position, nor apply for an adjournment.

19. It is not surprising that the Appellant does not want to return to Zimbabwe, and in this respect he is no different from many other appellants who do not wish to return to their home countries. In most cases, appellants' wishes are irrelevant, but this is not the case with those from Zimbabwe, and this is something which the Respondent has been aware of for many years. In JM (Zimbabwe) it states that this has been the policy since 2002. I find that there is no way in which the Respondent can compel the Appellant to lie and state to the Zimbabwean authorities that he is willing to return.

20. I therefore find that the Appellant has shown that the policy of the Zimbabwean authorities is an insurmountable obstacle to family life continuing in Zimbabwe. He has shown that he meets the requirements of paragraph EX.1(b) of Appendix FM.

Article 8

21. I have considered the Appellant's appeal under Article 8 in accordance with the case of Razgar [2004] UKHL 27. The Respondent was satisfied that the Appellant met the relationship requirements of the immigration rules. I find that the Appellant and Sponsor have a family life sufficient to engage the operation of Article 8. I find that the decision would interfere with this family life.

22. It was found in the First-tier Tribunal that the Sponsor could maintain contact with her family members through visits and modern means of communication. No separate finding was made as to whether the Sponsor had family life with her family

members in the United Kingdom, particularly her mother or stepmother. It was submitted in the skeleton argument that the Sponsor said that her family circumstances made it difficult for her to relocate outside the United Kingdom, but it was not submitted that she had a family life with any of them sufficient to engage the operation of Article 8.

23. In her witness statement the Sponsor said that her mother required her care, and that it would be in her mother's best interests if she could stay in the United Kingdom to look after her "when necessary". In relation to her stepmother, she referred to her illness, but did not indicate that she was required to provide any care. At the hearing she said that her mother was worse now, and was now only working part-time as she could not keep up with the workload. I find that there is no evidence to show that the Sponsor has a relationship with either her mother or stepmother, or indeed any other family member, sufficient to engage the operation of Article 8. There is insufficient evidence of dependency.

24. I find that the Appellant has been in the United Kingdom since December 1999, a period of some 19 years. I find that he has established a private life in the United Kingdom during that time. I find that the decision would interfere in his private life.

25. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

26. In assessing the public interest, I have taken into account all of my findings above in relation to the immigration rules. I have also taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I have found above that the Appellant meets the requirements of the immigration rules in relation to his family life. I therefore find that there will be no compromise to the maintenance of effective immigration control by allowing his appeal.

27. Although the application was refused with reference to the English language requirements, I find that the Appellant speaks fluent English (section 117B(2)). He could not sit an English language test as the Respondent had retained his passport.

28. The application was not refused with reference to the financial requirements. The Sponsor is still employed by the same company and earns in excess of the amount required to sponsor a spouse. I find that the Appellant and Sponsor are financially independent (section 117B(3)). Further, I find that when the Appellant was given

permission to work by the Respondent, he obtained employment as a support worker, working with adults with dementia, and then young adults with learning difficulties. He worked from 2014 until January 2018, earning about £17,600. He gave evidence that he would like to continue to work with young adults with learning difficulties.

29. Little weight is to be given to a relationship established when an individual is in the United Kingdom unlawfully (section 117B(4)). While I find that the relationship was established when the Appellant did not have leave, I have carefully considered the circumstances. The Judge in the First-tier Tribunal found that when the Appellant met and married his wife, he had an application outstanding with the Respondent. She found that it was the Respondent's delay that gave him the time and opportunity to meet and marry the Sponsor.

30. It is set out in the reasons for refusal letter that the Appellant received an asylum decision in 2010. He made further representations in May 2012, which were rejected in November 2017. The Appellant gave evidence that he had reported to the Respondent from 2010 to 2017. At the start he was required to report every two weeks. This then moved to monthly reporting, and then six-monthly reporting. He gave evidence that he fully complied, and never missed a day. He said that he was still reporting on a monthly basis. He gave evidence that he had been given permission to work by the Respondent in 2014. He had worked until January 2018.

31. The Appellant met the Sponsor in 2011. He was asked what his thinking had been, given that he had entered into a relationship when he had no leave. He said that he had fallen in love. Things had progressed and, when he was given permission to work in 2014, he moved in with the Sponsor. He gave evidence that he had had to apply to the Respondent when they decided to get married. The Respondent had not investigated whether the relationship was genuine, but had "assisted" him by releasing his passport to the registry office.

32. I find that there was a delay of over five years in the Respondent's consideration of the Appellant's further representations, from May 2012 to November 2017. The Respondent has not provided any explanation for this delay. I find that the Appellant's relationship progressed during this period of delay, during which time, presumably as a consequence of the delay, the Appellant was given permission to work. I find that the Appellant was in a position of limbo. The Respondent was not making a decision on his application, and neither was he making any attempt to remove the Appellant. I accept the evidence of the Appellant that he reported for the duration of this period. He did not go underground and could have been located by the Respondent for the entire period. The Respondent gave him permission to work, and permission to marry. He did not investigate the marriage, but allowed the marriage to proceed.

33. In relation to delay, I was referred to Agyarko, which states at [52]:

"It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control."

34. I find that the delay of the Respondent in dealing with the representations made in 2012 reduces the weight to be given to the public interest in maintaining effective immigration control, given the conduct of the Appellant, who reported for this entire period. I find that the weight to be given to the public interest in maintaining effective immigration control is also lessened by the fact that the Respondent was well aware that the relationship was becoming more permanent, as he was aware of the Appellant's intention to marry in 2016.

35. Section 117B(5) is not relevant to family life. Section 117B(6) is not relevant.

36. I have considered the Appellant's criminal convictions. The Committal Record Sheet indicates that the Appellant was sentenced to six months for dangerous driving, with sentences of one month running concurrently for assaulting a constable and criminal damage. These all arose from one incident. The agreed basis of plea was that the Appellant had not intended to injure the officer (page 127). The Appellant said in oral evidence that he was sorry. It was out of character, he had put his hands up and had admitted what he had done. He had accepted the outcome. He had plead guilty, so the matter had not gone to trial.

37. I find that these are the only convictions in a period of 19 years. As stated above, no reference was made to these by Mr. Avery. He did not cross-examine the Appellant and no reliance was placed on them in submissions. I find that no issue has been taken by the Respondent in relation to these offences, which is significant. It was not submitted that the suitability requirements under Appendix FM were not met in the light of these convictions. I find that they do not outweigh the weight to be given to his family life.

38. In relation to the immigration rules, the Appellant cannot meet the five year route as a partner as he has not taken an English language test. However, he speaks fluent English. Secondly, he does not meet the status requirements, but he cannot return to Zimbabwe to make an application from there. I have found above that his inability to return to Zimbabwe as a result of the Zimbabwean authorities' policy on returns of their nationals means that there are insurmountable obstacles to family life continuing in Zimbabwe, and that he meets the requirements of paragraph EX.1(b). I find on the balance of probabilities that he and the Sponsor can only enjoy family life in the United Kingdom.

39. Taking all of the above into account, I find that the rights of the Appellant and Sponsor outweigh the weight to be given to the public interest in maintaining effective immigration control. Giving particular weight to the fact that the Appellant meets the requirements of the immigration rules, and to the situation created by the

Zimbabwean authorities in relation to return of their nationals, I find that the balance comes down in favour of the Appellant. I find that the decision is not proportionate. I find that the Appellant has shown, on the balance of probabilities, that the decision is a breach of his rights, and those of the Sponsor, to a family life under Article 8 ECHR.

Notice of Decision

The Appellant's appeal is allowed on human rights grounds. The Appellant meets the requirements of paragraph EX.1(b) of Appendix FM.

No anonymity direction is made.

Signed Date 9 March 2019

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. In the circumstances, although the Respondent was aware of the issues regarding returns to Zimbabwe, this issue was not raised until now. In the circumstances, I make no fee award.

Signed Date 9 March 2019

Deputy Upper Tribunal Judge Chamberlain