Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16807/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 June 2019	**On 4 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

PRISCILLA MAPHOSA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Vokes of Counsel instructed by Biscoes Solicitors
For the Respondent: Ms J Isherwood of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Zimbabwe born on 22 February 1966. On 29 December 2007 she entered with leave until 17 March 2008 as a visitor. On 1 April 2009 she sought international surrogate protection which was refused and on 13 October 2009 her appeal rights became exhausted. She submitted 3 separate sets of further submissions on 31 August 2011, 25 January 2012 and 12 October 2012, all of which the Respondent rejected.

2. In late 2013 she met and entered into a relationship with the Sponsor, Mark McCrorie, a British citizen born on 15 April 1960. On 28 September

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2016 they married. On 2 December 2016 she submitted an application for subsidiary protection which on 16 January 2017 the Respondent refused.

The Sponsor

3. The Sponsor is in employment in the aviation industry as an Aero Engine Technician, trained to work on a particular type of aircraft engine. He has a tumour on his neck which is considered benign but is subject to regular MRI scanning and he suffers from Type 2 diabetes. He is divorced with two adult children from his former marriage living in the Portsmouth area with whom he and the Appellant are in frequent contact. He has two grandchildren.

Hearing History

4. On 8 February 2017 the Appellant applied for leave to remain on the basis of her private and family life in the United Kingdom. This was refused under paragraph 353 of the Immigration Rules and following the Appellant's issue of a Pre-Action Protocol letter, the Respondent withdrew the decision and on 3 August 2018 made a new decision to refuse the application. This is the decision under appeal.

5. On 13 August 2018 the Appellant lodged notice of appeal relying on grounds of Article 8 of the European Convention outside the Immigration Rules.

6. By a decision promulgated on 14 March 2019 Judge of the First-tier Tribunal Talbot dismissed the appeal. On 30 April 2019 Judge of the First-tier Tribunal M Robertson granted permission to appeal because it was arguable that Judge Talbot had failed to give adequate reasons why the Sponsor's health did not constitute insurmountable obstacles to the establishment of family life in Zimbabwe. The Respondent did not file a response under Procedure 24.

The Hearing

7. The Appellant and the Sponsor attended the hearing. She confirmed their present address but otherwise took no material part in the proceedings.

Submissions for the Appellant

8. Mr Vokes relied on all the grounds for appeal following *Safi and Others (permission to appeal decisions) [2018] UKUT 00388 (IAC)*. His first submission was that the Judge at paragraph 25 of his decision had accepted that for the Appellant and the Sponsor the prospect of establishing family life in Zimbabwe was "a daunting one". The test to ascertain whether there were "insurmountable obstacles" or "very significant difficulties" was a high test but not, contrary to what the Judge stated, a very high test. He relied on the judgment in *R (Agyarko) v SSHD [2017] UKSC 11*. The meaning of "insurmountable obstacles" is discussed at paragraphs 42-48 and at paragraph 43 the test is described as "stringent". The Judge had erred in law at paragraph 25 in setting too high

a threshold and this had also infected his assessment at paragraph 27 of the proportionality of the Respondent's decision by reference to Article 8 outside the Immigration Rules in respect of which he had commented on the proportionality of the "daunting prospect" to which he had referred at paragraph 25 and not adopted the recommended balance sheet approach.

9. His second submission was the Judge had not adequately taken into account the background evidence on the availability of health facilities in Zimbabwe which he had described at paragraphs 22 and 23. He referred me to the expert evidence given to the House of Commons International Development Committee (IDC) at pages 138 and 148 of the Appellant's bundle (AB). The Judge at paragraph 23 had found that treatment was not unavailable and had assumed without setting out the evidence on which the assumption had been based it would be more readily available in Bulawayo and Harare. The evidence before the IDC was that the health system had collapsed and that "there is a lot of fragmentation of services". He invited me to conclude there was a lack of adequate healthcare in Zimbabwe and this could constitute an "insurmountable obstacle". He referred me to the Respondent's Country Policy and Information Note (CPIN) on medical and healthcare issues in Zimbabwe which referred to the excessive prices for diabetes drugs and the availability of cancer screening services only in the private sector at a cost prohibitive for the majority. He referred to the extensive reliance on private sector health care available generally only through the workplace.

10. His third submission was that in addressing the Sponsor's employment opportunities at paragraph 24 the Judge had erred in reaching conclusions without due regard to the general situation of the economy in Zimbabwe and the difficulty, if not impossibility, of the Sponsor re-training in Zimbabwe. The Judge had ascertained after the hearing that the aero engine on which the Sponsor had been trained to work was not used in Zimbabwe. There was no evidence before the Judge of facilities for re-training of foreign nationals in the aviation industry in Zimbabwe and he had not taken into account the likely security issues.

11. The decision contained errors of law and should be set aside.

Submissions for the Respondent

12. Ms Isherwood highlighted that the Appellant is a failed asylum seeker and has a poor immigration history. Her relationship with the Sponsor was started in the full knowledge that her immigration status was precarious if not unlawful: see paragraph 10 of her statement at AB p.A12. There was no right for an individual to choose in which jurisdiction to enjoy family life. The evidence was the Appellant had had good employment in Zimbabwe where she has family.

13. The test was whether there were "very significant obstacles" which the Judge had set out at paragraphs 16 and 17 of his decision. He was entitled for the reasons given to reach his conclusions. At paragraph 21 he had taken into account the reports from the Sponsor's doctor and consultant

and at paragraph 24 concluded he would be able to afford medical treatment in Zimbabwe. I noted the Judge's conclusion had relied in part on the ability of the Sponsor's family in the United Kingdom financially assisting him. The Sponsor's doctor had not mentioned any continuing treatment.

14. The Judge had taken all relevant matters into account at paragraphs 20-24 of his decision which disclosed no arguable error of law and should stand.

Response for the Appellant

15. Mr Vokes referred to paragraph 27 of *Chikwamba v SSHD [2008] UKHL 40* noting the only substantial ground for refusal under the Immigration Rules was the Appellant's lack of immigration status. The Appellant's challenge was to the Judge's interpretation of the evidence. The Respondent's policy was "subtle". Regard had to be given to the Sponsor's reliance on daily injections of insulin which constituted on-going medical treatment. The decision should be set aside and the appeal allowed.

Findings on error of law issue

16. I find for the reasons given by Mr Vokes in his first submission that the Judge erred in setting a "very high" test for assessing whether there are "insurmountable obstacles". Further, the Judge made no reference to or consideration of the public interest factors identified in s. 117B Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act).

17. The Judge noted at paragraph 24 that the Zimbabwean economy is in a very poor state which would have an impact on the employment prospects of both the Appellant and the Sponsor. He acknowledged that in any event the Sponsor may have to re—train but did not make any assessment whether this was practicable in all the circumstances. At paragraphs 25 and 26 the Judge did not take expressly address the difficulties or lack of difficulties which the Sponsor would face on seeking to integrate into and establish himself in Zimbabwe. It is only at paragraph 27 he considered the prospect of the Appellant returning alone to Zimbabwe to seek entry clearance. It appears there was no information before the Judge about the likely time it would take for the Appellant on return to make an application and for it to be considered, bearing in mind that there is no visa post in Zimbabwe.

18. The Judge referred to the need for a fact-specific assessment to be made and concluded that the hardship which would arise from the Appellant's temporary return to Zimbabwe is limited and had to be balanced against a weighty public interest in terms of the Appellant's poor immigration history. There was no detailed fact specific assessment of the situation and timetable in the event of the Appellant's return: see paragraphs 36-43 of *Chikwamba*.

19. I conclude that there is a material error of law in the Judge's decision. The parties agreed at the hearing that in the event there was a material error

of law the appeal could be dealt with substantively in this decision subject to the further submissions made for each party at the hearing.

Further Submissions

20. Mr Vokes referred to the issue of the expense of private health care in Zimbabwe highlighted the April 2019 (post-F-tT hearing) CPIN on medical and healthcare issues in Zimbabwe at paragraphs1.4.1 and 4.1.2-4. He also mentioned the failing mental health service noting that the Sponsor's doctor had indicated that the Sponsor's depression had "the potential to significantly decline if a move to Zimbabwe is enforced".

21. Ms Isherwood submitted that the starting point for the proportionality assessment should be the ability of the Sponsor and the Appellant to find employment, the ability of the Sponsor's family in the United Kingdom and the Appellant's family in Zimbabwe to support them on their move to Zimbabwe and the ability of the Sponsor to re—train to fit himself for local employment.

22. The latest CPIN showed that health facilities were available, even if costly, in Zimbabwe. No list of the medications taken by the Sponsor had been supplied so it was not possible to check whether they were available in Zimbabwe it was acknowledged that the CPIN particularly at paragraph 4.1.1 noted that some medicines for the treatment of diabetes in Zimbabwe are not available. The sponsor had not shown that he was presently undergoing or in need of continuing psychiatric treatment beyond medication.

23. Mr Vokes responded that the Sponsor had never been to Zimbabwe and that his current mental health issues had to be put into the context of what was likely to happen on moving to Zimbabwe, particularly in the light of what his doctor had written. The availability of health insurance was effectively dependent on the Appellant and the Sponsor finding suitable employment which would not be easy in the light of the current poor state of the Zimbabwean economy. It was unrealistic to expect the Sponsor will be able to re-train for employment in the aviation industry.

24. The First-tier Tribunal had found that the prospect of re-location to Zimbabwe was daunting and in addition regard should be had to the Sponsor's long-term medical conditions. The Sponsor had extensive family in the United Kingdom including his aged parents and grandchildren with whom he maintains close contact. It was acknowledged the Appellant's relationship with the Sponsor had been formed and continued while her immigration status was precarious.The appeal should be allowed.

Re-consideration of the Substantive Appeal

25. There was no challenge to the Judge's findings on the factual matrix of the appeal. I accept the submissions that the Sponsor is most unlikely to be able to re—train in the aviation industry in any position similar to his present one as an aero engine technician and that at his age and with a complete absence of any experience of life in Zimbabwe (or elsewhere in

sub- Sahara Africa) he is unlikely to find employment. There was no evidence that his parents or children are in a position to assist the Sponsor with any prospective medical costs he would likely incur in Zimbabwe. His doctor has expressed concern that if he had to settle in Zimbabwe his mental state is likely to deteriorate. The background evidence is that while psychiatric medications may be available in Zimbabwe there is little by way of psychiatric care. The Sponsor's mental state would also be a relevant factor in assessing his employment prospects in Zimbabwe. Looking at the evidence in the round, there are very significant obstacles to the Sponsor's settlement in Zimbabwe with the Appellant.

26. Having regard to the factors identified in s. 117B of the 2002 Act, the Appellant's immigration history is poor. Her relationship with the Sponsor was formed at a time when she had no immigration status and so was unlawfully present in the United Kingdom. Consequently, the 2002 Act requires little weight be given to the relationship of the Appellant and the Sponsor There was no suggestion advanced by the Respondent that the Appellant was not fluent in English and even if permitted, would not be able to find employment or otherwise be financially independent. The Respondent's only substantial ground for refusal is the Appellant's lack of immigration status at the time she made her application and her unsatisfactory immigration history.

27. The reality is that if the Appellant's appeal is dismissed she will be forced to return to Zimbabwe to seek entry clearance to return to the United Kingdom to join the Sponsor, her husband. The Respondent has not suggested at any time that there is any reason to anticipate that on return Zimbabwe the Appellant will not be able to show she meets the relevant requirements of paragraph 281 of the Immigration Rules. Those factors adverse to the Appellant which have been identified are her lack of the appropriate immigration status to satisfy the requirements of paragraph 281 and her poor immigration history and the public interest in maintaining effective immigration controls. The Respondent has not sought to rely on any aspect of paragraphs 320 or 322 of the Immigration Rules. With reference to the Immigration Rules for the Appellant cannot satisfy them only for the matters mentioned in this paragraph.

28. The appeal is on human rights grounds and so I consider the Appellant's claim under Article 8 of European Convention outside the Immigration Rules. In terms of the general situation in Zimbabwe, I note that while a new government has been recently elected in Zimbabwe, the situation there remains uncertain and there is no evidence that it has improved so that conditions there can no longer be said to be "harsh and unpalatable", as described by the Judge.

29. I take account of the nature of the Respondent's challenge to the present application (lack of relevant entry clearance and poor immigration history). On this basis it is likely to be the case that, the Appellant would meet the requirements of paragraph 281 of the Immigration Rules and succeed on an application for entry clearance to join the Sponsor, her husband in the United Kingdom in which event refusal would be disproportionate to the

need to maintain immigration control: see *TZ (Pakistan) v SSHD [2018] EWCA Civ. 1109* in which it is also noted that in conducting a balancing exercise the factors are not equally weighted.

30. I have had regard to lead judgment of Lord Brown in *Chikwamba.* He stated:

> 42….In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant. And there may be good reason to apply the policy if the ECO abroad is better placed than the immigration authorities here to investigate the claim, perhaps as to the genuineness of a marriage or a relationship claimed between family members, less good reason if the policy may ultimately result in a second section 65 appeal here with the appellant abroad and unable therefore to give live evidence.
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> 44…..Should the article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the ECO (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the article 8 claim be decided once and for all at the initial stage. If it is well-founded, leave should be granted. If not, it should be refused.
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> 46…… Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum-seekers remained suspended for more than two years after the appellant's marriage and where conditions are "harsh and unpalatable", and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the UK to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer.

31. At paragraph 43 of *Agyarko,* the Supreme Court adopted the view that "insurmountable obstacles" needs to be understood in a practical and realistic sense and at paragraph 45 that outside the Rules leave to remain may be granted in "exceptional circumstances" and adopted the Respondent's view in its then current Instructions that these were "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal… Would not be proportionate".

32. At paragraph 51 the Supreme Court found:

> …. If, on the other hand, and applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal…..

and at paragraph 57 that:

> …. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

33. Looking at the evidence in the round, and the inevitable disruption to the family life of each of the Sponsor and the Appellant, what the Sponsor's doctor has written about the likely increased pressure on the Sponsor's psychological health, I conclude the Appellant has shown that, applying the *Agyarko* test of stringency there are very significant obstacles to the establishment of family life with the Sponsor in Zimbabwe.

34. The remaining issue is whether the Appellant has shown there is no real public benefit in the maintenance of immigration controls if she were forced to return to Zimbabwe to seek entry clearance in the light of the findings already made about the likelihood of her show meeting all the requirements of the relevant Immigration Rules for entry clearance for settlement as a spouse.

35. Having regard to the views expressed in *Chikwamba* already mentioned, the findings already made and the prospect of the Appellant satisfying the requirements of the Immigration Rules on an entry clearance application and considering the factors identified in s.117B of the 2002 Act (including the precariousness issue), I find that in these particular circumstances reduced weight can be attached to the need to maintain immigration controls, such that the Respondent's decision is disproportionate to any of the legitimate public objectives identified by Article 8(2) of the European Convention. The appeal is allowed on human rights grounds.

Anonymity

36. There was no request for an anonymity direction and having heard the appeal, I consider none is warranted.

SUMMARY OF DECISION

The appeal of the Appellant is allowed on human rights grounds.
No anonymity direction is made.

Signed/Official Crest Date 28. vi. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

I have allowed the appeal and decline to make any fee award because the appeals have been allowed on the basis of evidence submitted subsequent to the Respondent's decision.

Signed/Official Crest Date 28. vi. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal.