Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04448/2020**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
Remotely by Microsoft Teams	
On 25 November 2021	**On 15 December 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

CSP
(ANONYMITY ORDER IN FORCE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Forbes, Lifeline Options CIC
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

The appellant, who claims to be a citizen of Zimbabwe, was born on 6 November 1970. She entered the United Kingdom on 14 April 2001 using a South African passport with leave to enter as a visitor for six months.

On 3 July 2001 the appellant applied for asylum as the dependant of her spouse, "SZ". On 20 July 2001, that application was refused. On 17 April 2002 the appellant lodged an appeal but that appeal was withdrawn on 21 November 2002. That was because SZ had made an application for leave to remain as a student and the appellant sought leave as his dependent spouse. On 13 October 2005, the appellant was refused leave to remain with no right of appeal.

On 29 January 2009, the appellant made further submissions relying upon Arts 3 and 8 of the ECHR. That application was refused on 19 October 2010 with no right of appeal.

On 30 August 2018, the appellant applied for indefinite leave to remain. On 19 November 2018, that application was refused as the appellant had not previously been granted leave on the basis of refugee status or on the grounds of humanitarian protection.

On 23 January 2020, the appellant was served with a notice of liability to removal and was invited to provide a Statement of Additional Grounds.

On 30 January 2020, a Statement of Additional Grounds was lodged with the respondent in which she claimed that she could not be returned to South Africa as she was not a South African citizen but, rather, was a citizen of Zimbabwe and that her South African passport had been acquired fraudulently in order to facilitate her entry to the UK. She claimed that she fled Zimbabwe in 2000 as a result of farm seizures which culminated in the disappearance of her mother. She claimed that she felt her life was in danger then and so she fled to South Africa where she settled prior to coming to the UK.

On 10 March 2020, the Secretary of State refused her human rights claim under Arts 3 and 8 of the ECHR.

The Appeal to the First-tier Tribunal

The appellant appealed to the First-tier Tribunal. In a decision sent on 13 January 2021, Judge French dismissed the appellant's appeal on all grounds.

The judge found that the appellant had not established that she would be at risk on return to Zimbabwe (or, indeed, South Africa). The judge found that, on the basis that the appellant conceded that she had used a false South African passport to enter the UK, she could not succeed under para 276ADE of the Immigration Rules (HC 395 as amended) because she failed on the suitability ground in S-LTR.4.2 of Appendix FM. Further, in any event it was not

established that she would face "very significant obstacles" to integration in Zimbabwe or South Africa. Finally, the appellant's removal would not be a disproportionate interference with her private and family life protected by Art 8.1 as it would be proportionate and the public interest in removal was not outweighed by her circumstances.

The Appeal to the Upper Tribunal

The appellant sought permission to appeal to the Upper Tribunal on four grounds.

First, the judge had reached an irrational finding that the appellant's husband had not been granted subsidiary protection in Ireland because the judge had failed to take into account evidence in the appellant's bundle (at AB5 and also at AB8) which established that he had been granted humanitarian protection in Ireland. Secondly, the judge failed to take into account all the evidence, including the appellant's witness statement, as to the basis upon which her husband had been granted humanitarian protection in Ireland in 2013. Thirdly, in concluding that the appellant had never explained the basis on which she was in fear in Zimbabwe, the judge failed to take into account what was said in her Statement of Additional Grounds. Fourthly, the errors identified in grounds 1 to 3, infected the judge's proportionality assessment as he failed, therefore, to take into account her fears on return to Zimbabwe.

On 2 February 2021, the First-tier Tribunal (UTJ Martin) refused the appellant's application for permission to appeal. However, on renewal, permission to appeal was granted by UTJ Kamara on 10 March 2021. Her reasons are succinctly set out at para 2 of her decision as follows:-

> "It is arguable that the judge materially erred in finding that the appellant's partner had not been granted Subsidiary Protection in the Republic of Ireland, given the documents before the Tribunal. It is further arguable that the judge's findings did not engage with the evidence relating to the basis of the humanitarian protection claim of the appellant's partner or the appellant's Statement of Additional Grounds."

On 15 April 2021, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision.

The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 25 November 2021. I was based at the Cardiff CJC and Mr Forbes, who represented the appellant, and Mr Tan, who represented the respondent, joined the hearing remotely by Microsoft Teams.

The Submissions

On behalf of the appellant, Mr Forbes adopted the grounds of appeal. He accepted that the appellant was not making a humanitarian protection claim. Her claim was based upon her human rights. He accepted that grounds 1 to 3 effectively concerned the credibility of the appellant. Ground 4 related to proportionality.

As regards ground 1, Mr Forbes submitted that the documentary evidence before the judge demonstrated that the appellant's partner had been granted subsidiary protection in Ireland. He submitted that not only was there a document from the International Protection Appeals Tribunal in Ireland dated 23 January 2019 indicating that the Tribunal had set aside the Irish government's decision to refuse her partner subsidiary protection but also there was a vignette from the partner's passport showing that he had been granted a residence permit, documentation concerning a reunification application by both the appellant and their son, "MZ" who lived in Zimbabwe on the basis that the appellant's partner was a beneficiary of subsidiary protection.

Mr Forbes submitted that the essence of the appellant's Art 8 claim was that she wished to remain in the UK in order to make a reunification application with her husband in Ireland. In support of that claim, Mr Forbes made reference to the decision in the House of Lords in Chikwamba v SSHD [2008] UKHL 40. Relying on that case, he submitted that there was no public interest in removing the appellant if she could return (albeit to Ireland) to effect family reunification with her husband.

Mr Forbes also relied upon grounds 2 and 3 which, he submitted, were relevant to the judge's assessment of the appellant's credibility and then infected his assessment of Art 8 in relation to her circumstances on return to Zimbabwe.

As regards ground 4, Mr Forbes submitted that the appellant had been in the UK for around nineteen years, she wanted to pursue reunification with her husband in Ireland and she had a subjective fear in Zimbabwe and, if returned to South Africa, of being sent on to Zimbabwe. He submitted that the judge had failed, in assessing the proportionality of her removal, to consider all these factors.

In response, Mr Tan relied upon the rule 24 notice. He submitted that the appellant's case was only about an interference with her "private life" because the judge had found in para 7 of his decision that there was no "family life" established between the appellant, on the one hand, and her husband and son, on the other hand, who had been "separated" and were "not a family unit". Mr Tan submitted that was important in assessing the appellant's Art 8 claim.

In relation to ground 1, he submitted that any misunderstanding over SZ's status in Ireland was not material. The judge had found that there was no relationship between the appellant and SZ. Mr Tan submitted that the appellant could pursue her reunification application from Zimbabwe or South Africa.

In relation to ground 2, Mr Tan submitted that the evidence was vague as to why humanitarian protection had been sought by the appellant's husband in Ireland as set out in the s.120 Statement of Additional Grounds. There was no evidence as to the basis upon which he had actually been granted humanitarian protection in Ireland. In any event, Mr Tan submitted that the

judge had found at para 9 of his decision that, on the limited evidence, the appellant had not established a risk on return to Zimbabwe.

As regards ground 3, Mr Tan submitted there was no evidence to support her (or her husband) being at risk on return.

In relation to Ground 4, overall Mr Tan submitted that the judge was entitled to find that the appellant could not meet the "suitability" requirement" as she had, on her own evidence, entered the UK using a false South African passport. In any event, she claimed to be a Zimbabwe national and had not disclosed that. As regards the appellant's private life, he submitted there was scant evidence of this, other than the period of time she has been here, and the judge was fully entitled to dismiss her appeal under Art 8 of the ECHR.

In reply, Mr Forbes drew my attention to documents such as the appellant's birth certificate (at C1) and a letter seeking to renunciate her South African citizenship (at D1, D2 and D4) which, he submitted, might have allowed the judge to find she was, in fact, Zimbabwean. He submitted that there was a lack of clarity in the judge's decision as to whether he found that she was a citizen of South Africa or of Zimbabwe.

Discussion

It is helpful, at the outset, to set out the relevant passages from the judge's decision in which he considered the evidence and made relevant findings in respect of Art 8 of the ECHR which was the principal provision relied upon before the judge.

At para 6 of his decision, the judge dealt with the evidence and, in particular, the absence of any evidence from the appellant's partner, SZ:

> "6. …. In the event the Appellant was the only live witness (although it had been intimated previously that the Appellant's partner) [SZ] was going to be called. No explanation was given as to why he was not called, particularly bearing in mind that he was a major part of the Appellant's argument that it would be unreasonable to remove the Appellant pending possible leave to join [SZ] in Ireland. There was a letter from [SZ] dated 28/05/19 in which he said that after maintaining a long-distance relationship for a number of years, it became a 'separation'. It was argued by Mr Forbes that it had been a physical and not an emotional separation. However this issue could have been resolved had [SZ] given oral evidence. Another issue that [SZ] could have assisted with was the situation in South Africa and Zimbabwe since he has been there more recently than the Appellant. The Appellant did not seem clear as to precisely what [SZ's] movements had been between South Africa and Zimbabwe in the period from 2007 to 2013, let alone what had directly [] caused him to seek humanitarian protection in Ireland in 2013. In the absence of [SZ], I had only the Appellant's oral evidence in support of appeal. However on the Appellant's own admission she had deceived passport authorities in South Africa, Zimbabwe, Botswana and the UK. Whilst it was noted that it was claimed that the Appellant was coerced by [SZ], in my view the credibility of the Appellant was adversely affected. It also seemed to me that the Appellant was evasive

> in her responses to questions, such as how she had managed to survive in the UK for so many years, with no apparent regular source of income."

As will be clear, the judge identified a number of factors which led him to doubt the credibility and cogency of the appellant's evidence.

Then at para 7, the judge went on to deal with the relationship between the Appellant and SZ and her son:

> "I am satisfied that there was no reason why the appellant should be given leave to remain in the UK. The Appellant had remained in the UK unlawfully since April 2001. She arrived in the UK on a South African passport with a 6 month visitor's visa. I do not feel it is appropriate to treat the appellant as though she had been [lawfully] resident in the UK, when she had not, and she only had been so long because she had failed to leave the UK despite a number of applications being refused. I am not satisfied that there is any justification to admit this application to remain in the UK on a basis of family life. The Appellant has not lived with her partner or son since 2007. The statement from [SZ] seems to indicate and the Appellant are 'separated' (i.e. that they are not a family unit)."

I have inserted the word "lawfully" before the phrase "resident in the UK" in that paragraph as the passage can only make sense if that was what was intended by the judge but unintentionally omitted.

In my judgment, Mr Tan is correct in his submission that the judge found that no family life existed between the appellant and her partner and son as they had been "separated" for a considerable period of time. However, that said, as will become clear shortly, the judge went on to consider any impact on her relationships with them albeit, perhaps, in the context of private life.

So, at paras 8 – 10, the judge considered the appellant's claim both outside the Rules on the basis of whether there were "unjustifiably harsh consequences" (see para 8) and under the Rules, in particular para 276ADE(1)(vi) on the basis that there would be "very significant obstacles" to her integration on return to Zimbabwe or South Africa.

At paras 9 – 10, the judge said this:

> "9. I have considered all the evidence put before me in the extensive documentation. There are numerous inconsistencies in the evidence put before me. One example is that the Appellant claims that her South African passport is false, but that has not been established. The passport has been used without challenge. She has used that passport for numerous trips between South Africa and Zimbabwe from 1999 onwards. Moreover, there are gaps in the timeline provided. The Appellant claims that she had to leave Zimbabwe because of the political unrest and stayed in South Africa for only a short period, but she spent at least two years travelling back and forth between the 2 countries, and was in Zimbabwe only a month before she came to the UK. Moreover she has never explained why she and her partner should have been of particular interest to Zimbabwean security forces. In any event on the issue of family life I note that the Appellant and her partner and son have chosen not to live together as a family unit since 2007. If they wish to continue to enjoy family life the Appellant could have gone with [SZ] when he went to South Africa in 2007. When he left Zimbabwe in

2013 again they had the option of resuming family life, by living together. They chose not to and [SZ] instead went to Ireland. On the question of proportionality I am required to take into account ss.117A – 117D of the Nationality, Immigration and Asylum Act 2002, as amended. I am satisfied that the Appellant is not financially independent (s.117B(3)), but I have been given no information on how she has been able to survive for 19 years when she had been prohibited from working. I have considered s.55 and accept that it might be in the best interests of a child to resume living with his mother. However [MZ] is now 19 and he has [not] lived with the Appellant since he was 6. Moreover although I am told that [MZ] is autistic, I have not been given any medical evidence of this. It is my view that there was no compelling reason why the Appellant[] should be granted leave to remain in the UK. She lives alone and has been for thirteen years. I should also make the point that I not believe that the Appellant would be at any risk to her wellbeing by returning to South Africa or Zimbabwe. She has never explained why she would be considered to be an enemy of the state. She has travelled numerous times between the 2 countries between 1999 and 2001. [SZ] has lived back there for 6 years between 2007 and 2013, without any apparent adverse consequences.

10. I am satisfied that the Appellant would have no difficulty in re-integrating into Zimbabwe or South Africa. She has lived in Zimbabwe until she was 30. She was familiar with the language and customs. I have been given no information about whether there was any immediate or extended family in Zimbabwe. I was given some vague suggestion that the Appellant might have some family in the UK, but [not] who those people were or how often she saw them. I am satisfied that it would not be detrimental to the interests of the Appellant to return to Zimbabwe. I am not told of any family or network or friends in the UK. There was mention in the documentation of some health problems but I have been given no medical evidence to confirm that the Appellant has had any significant health problems, let alone if so that she would not receive treatment for any such conditions in Zimbabwe. As far as I am concerned I see no reason why the Appellant would be unable to provide for herself financially in Zimbabwe as she had in the UK, particularly bearing in mind that she would be able to work legally, which she was not permitted to do in the UK."

Then at para 11, the judge reached his conclusions as follows:

"11. For the sake of clarity I find that (1) the Appellant fails (*sic*) for refusal on grounds of suitability in Section S-LTR of Appendix FM (2) in addition to not meeting the suitability requirement the Appellant has not shown that there would be 'very significant obstacles' to her re-integration into Zimbabwe (in the light of the Rules in paragraph 276ADE) (3) since the Immigration Rules are not met I have given very careful consideration as to whether there are exceptional or compelling circumstances which would justify consideration of Article 8 outside the Rules, but I do not consider there would be a breach of Article 8 such as would outweigh the public interest in removal. (4) I am not satisfied the Appellant has any cause to fear for safety by returning to South Africa or Zimbabwe (Articles 2 and 3). There was no evidence she had ever been persecuted by the authorities, or done anything to attract their adverse attention. [SZ] had travelled between the two countries for six years, without any apparent adverse consequences. Bearing in mind all the above, I find that the scales fall firmly on the side of the respondent and the maintenance of immigration control. I find the decision made is proportionate. The Appellant should return to South Africa, given that

> she travelled to the UK on a valid South African passport. The South African authorities would then have to determine whether she should be deported back to Zimbabwe. I find no compelling reason to permit me to allow the appeal."

In his oral submissions, Mr Forbes raised the point that it was unclear whether the judge accepted that the appellant was a South African citizen or a Zimbabwe citizen. It appears, however, that the judge accepted that the appellant was, at least, a citizen of South Africa as he found, in para 9 of his decision, that it had not been established that her South African passport was false. The basis upon which she would have been granted a genuine South African passport would, and nothing has been suggested to the contrary, be on the basis that she was a citizen of South Africa. Likewise, in para 11 of his determination the judge contemplated the appellant's return to South Africa. However, in doing that he recognised that the appellant's case was that she might be sent from there to Zimbabwe and the judge considered what would be the implications for her, if that happened, in Zimbabwe. The judge, of course, found that the appellant could be properly returned to either South Africa or Zimbabwe without that being contrary to para 276ADE(1)(vi) or Art 8 outside the Rules.

Even if there were a lack of clarity as to the appellant's nationality, something which she undoubtedly contributed to having raised the issue that her South African passport was false, I see no basis upon which the judge's decision can be challenged as the judge considers all possible return options.

I turn now to the specific grounds (1-4).

As regards ground 1, Mr Tan, in effect, accepted that the judge had not considered all the evidence concerning SZ's protection status in Ireland when the judge stated in para 5 that it was "incorrect" that SZ had been granted subsidiary protection in Ireland. The documentation, which was before the judge, in my view, plainly establishes that. However, I accept Mr Tan's submission that the error by the judge was not material. First, it was not material in the sense that the judge went on to consider the appellant's claim to remain in the UK, on the basis upon which it was put forward, namely that she wished to join her husband in Ireland on the basis of reunification with a person granted subsidiary protection. Secondly, the judge's adverse credibility findings, in particular in para 6, do not rest, wholly or in part, upon the judge's view taken in para 5 that it has not been established that SZ has been granted subsidiary protection in Ireland. It is, rather, based upon inconsistencies in the evidence of the appellant and SZ concerning their circumstances and the appellant's own concession that she used a false South African passport to enter the UK and, it would seem, a number of other countries as well.

As regards grounds 2 and 3, which I can take together, I do not accept that the judge failed to take into account all the evidence put forward by the appellant as to her claimed fears in Zimbabwe or as to the basis upon which her partner had been granted subsidiary protection in Ireland.

In relation to the latter, the documents issued by the Irish authorities offer no basis for the grant of subsidiary protection. As regards SZ's own evidence, not given orally but in a letter dated 28 May 2019, the only evidence was that he had moved a significant number of times in the period 2007 to 2013 between South Africa and Zimbabwe before seeking humanitarian protection in Ireland in 2013.

In respect of the appellant's own fears, those were set out in the Statement of Additional Grounds which the judge referred to in para 3 of his decision. The judge, no doubt, had that evidence fully in mind when assessing the appellant's claimed fears in Zimbabwe. When the judge said in para 6 that he "had only the appellant's oral evidence in support of her appeal", that has to be read in the light of the fact that he sets out the appellant's evidence in her Statement of Additional Grounds in para 3. Perhaps, to have expressed himself more accurately, the judge meant that he had no evidence independent of the appellant concerning her claimed circumstances in Zimbabwe.

As the judge pointed out in para 9, the judge found that the appellant would not be at risk on return to South Africa or Zimbabwe – and of course her claimed fear was in the latter country in effect – taking into account that she had travelled a number of times between the two countries between 1999 and 2001 and SZ had lived there for six years between 2007 and 2013 without any apparent adverse consequences.

Mr Forbes did not pursue any protection claim on behalf of the appellant based upon her being at real risk on return to Zimbabwe. The relevance of her fear was, in his submission, that the judge should have regard to them being subjective fears when assessing her circumstances on return under Art 8. Whilst those subjective fears will have some relevance, absent any objective foundation they cannot take the appellant's case under Art 8 very far.

I see no reasonable basis upon which it can be said that the judge has failed to take into account all the relevant circumstances in assessing the appellant's claim under Art 8, whether by reference to para 276ADE(1)(vi) or outside the Rules on the basis of whether her removal would result in "unjustifiably harsh consequences" so as to outweigh the public interest.

I turn now to ground 4 and the decision in respect of Art 8 outside the Rules. Standing back from the judge's decision, Mr Forbes acknowledged that the essence of the appellant's claim was that she wished to remain in the UK in order to pursue (successfully she hoped) her reunification claim with her partner in Ireland. Mr Forbes' reliance upon the case of Chikwamba in that regard is, in my judgment, misplaced. That case recognises that there may be no public interest in removing an individual in circumstances where it is established that they would obtain entry clearance to return to the UK because they would meet the requirements of the entry requirements in the Immigration Rules. That is not the appellant's claim in this case. She is not contending that there is no public interest in removing her because she would be able to return to the UK with entry clearance because she would meet the requirements of the Immigration Rules to come back. She would not: she has

no basis for re-entering the UK. Her claim is that she would, in time, be able to enter Ireland on the basis of reunification. That possibility does not affect the public interest in her removal from the UK where she has no basis for remaining and no basis upon which she could re-enter.

Further, as the judge found, even if "family life" existed between the appellant and her husband and son, her removal to Zimbabwe or South Africa would not interfere with that family life. She has not lived with her son since 2007 and, indeed, he lives in Zimbabwe. She has been "separated" from her husband also since 2007. Removal to South Africa or Zimbabwe could not, in my judgment, conceivably be said to be a disproportionate interference with any "family life" which might exist.

As regards her private life, as the judge noted, there was limited evidence about her private life in the UK and, in his submissions, Mr Forbes relied on the fact that she had been here for nineteen years. Her private life claim was, in my judgment, very weak indeed. It was inevitable that the appellant's claim whether based upon her family or private life in the UK was dismissed by the judge on the basis that it was not disproportionate to remove her to South Africa or Zimbabwe.

For all these reasons, I reject grounds 1, 2, 3 and 4. I am satisfied that the judge did not materially err in law in dismissing the appellant's human rights claim under Art 8 (or, to the extent relied upon, Art 3).

Decision

The decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
7 December 2021

TO THE RESPONDENT
FEE AWARD

The judge made no fee award and since I have dismissed the appellant's appeal to the Upper Tribunal, that decision also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
7 December 2021