



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/40815/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3 February 2016

Decision & Reasons Promulgated
On 22 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR TK
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Mtisi, Legal Representative
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. An anonymity order was made previously. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

2. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against a decision of the respondent taken on 9 September 2014 to refuse his application for indefinite leave to remain in the United Kingdom. The respondent also gave directions under Section 10 of the Immigration and Asylum Act 1999 for the removal of the appellant from the UK.

Background Facts

3. The appellant is a citizen of Zimbabwe whose date of birth is 13 April 1957. The appellant entered the United Kingdom on 10 September 2002 and was granted leave to enter as a visitor until 1 September 2002. On 6 September the appellant submitted an application for an extension of his leave to remain as a visitor. He was granted leave until 10 February 2003. On 29 January 2003 the appellant was a dependant upon his spouse's transfer of conditions application and was granted leave in line with that application until 6 August 2004. On 5 August 2004 the appellant was granted leave as the dependant of a spouse work permit holder until 7 September 2009. In 2005 the Home Office received a letter from the appellant's estranged spouse notifying them that she was no longer in a relationship with the appellant. The appellant failed to update the authorities regarding his change in circumstances. On 21 August 2009 the appellant submitted an 'outside the Immigration Rules' application which was refused on 24 June 2010. On 9 July 2010 the appellant submitted an appeal to the First-tier Tribunal which was dismissed on 19 August 2010. On 1 September 2010 the appellant's appeal rights were exhausted. On 6 February 2014 the appellant was served with an IS151A notice notifying him that he had overstayed his period of valid leave and was liable to be removed. On 20 February the appellant applied for leave to remain under Article 8 of the European Convention on Human Rights ('European Convention on Human Rights') on the basis of private and family life. He also claimed that he could not return to Zimbabwe because he feared persecution due to his Movement for Democratic Change ('MDC') membership. The appellant also claimed that he was unwell with debilitating depression for which he was receiving treatment.
4. That application was refused because the Secretary of State did not consider that there were insurmountable obstacles to family life with the appellant's partner continuing outside of the UK in relation to family life. In relation to private life the respondent did not consider that there would be very significant obstacles to his integration into Zimbabwe. The respondent did not consider that there were any exceptional circumstances warranting a grant of leave outside the Immigration Rules. The respondent also considered the appellant's medical condition and although the respondent accepted that the healthcare systems in the UK and in Zimbabwe are unlikely to be equivalent she decided that this does not constitute exceptional circumstances. The respondent also considered Article 3 in relation to the appellant's medical condition and considered that the appellant's case did not meet the threshold indicated in the case of **N v United Kingdom - 26565/05 [2008] ECHR**.
5. Regarding fear on return to Zimbabwe the respondent noted that the appellant had previously raised his fear on return issues at his appeal in 2010. This appeal against

the respondent's decision was dismissed by First-tier Tribunal Judge Telford in August 2010. The judge found that the appellant had no "subjective fear of return to Zimbabwe". The respondent noted that the appellant has never made a formal asylum claim. On 26 March 2014 and on 25 July 2014 the respondent had written to inform the appellant that any application for international protection must be made in person.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 10 June 2015 First-tier Tribunal Judge C M Phillips dismissed the appellant's appeal. The judge found that the appellant and Ms J (his partner) were not in a durable, genuine and subsisting relationship akin to marriage and therefore that he did not meet the requirements of Appendix FM. The judge noted that the respondent's decision was issued on the basis that the appellant and Ms J's relationship was considered to be genuine and subsisting but the respondent considered that there were no insurmountable obstacles to family life continuing in Zimbabwe. The judge found that this decision was correct in that it would be reasonable for them to continue family life in Zimbabwe. In relation to Article 8 outside the Immigration Rules the judge considered the relationship with Ms J to constitute a private life given his finding that they were not in a genuine and subsisting relationship. In the alternative the judge found that it was open to the appellant to return to Zimbabwe and apply for entry clearance. The judge also considered that the public interest considerations in Section 117B of the Nationality, Immigration and Asylum Act 2002 (the '2002 Act') apply. He found that the medical issues do not reach the Article 3 threshold but considered them as part of private life. The judge found that little weight can be given to the relationship with Ms J because this was established after the appellant's asylum appeal was dismissed. The judge found that the interference with the appellant's private life would not constitute the level required to engage Article 8. The judge found that even taking the evidence at its highest the appellant and Ms J do not have serious medical conditions requiring long-term care. In relation to the claim that the appellant would fear persecution on return to Zimbabwe the judge found that the appellant was seriously lacking in credibility, that the appellant's attempt to found a sur place claim lacked credibility, finding that there was no risk on return for either the appellant or Ms J.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal. On 7 September 2015 First-tier Tribunal Judge P J M Hollingworth refused the application for permission to appeal. The appellant renewed that application to the Upper Tribunal and on 22 October 2015 Upper Tribunal Judge Eshun granted the appellant permission to appeal. The grant of permission sets out that all the grounds disclose arguable errors.

Summary of Submissions

The appellant's submissions

8. The grounds of appeal assert that the assessment of risk on return to Zimbabwe by the First-tier Tribunal Judge is manifestly flawed for failure to adequately consider evidence. At the hearing Mr Mtisi had made no submissions regarding this ground of appeal. I therefore asked if the appellant wished to pursue this ground. Mr Mtisi submitted that the appellant's sur place activities postdate the initial decision refusing asylum. He has submitted that the appellant's links with the MDC were shown by his membership card. He submitted that in relation to current case law that evidence postdating the **CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059(IAC)** case appeared at pages 75 to 121 of the bundle. He submitted that it was an error of law as there was clear evidence as presented to the judge that the picture was not as rosy in Zimbabwe as at the time of **CM**. He submitted that ZANU-PF is in control. He referred to pages 122 to 123 of the bundle of documents before the First-tier Tribunal where there was a chilling warning that exiles would be subject to intrusive screening. He submitted that based on the objective evidence it is not just those with significant profiles but those suspected of links with the MDC that would be at risk. He submitted that those with a military background were at enhanced risk, that there was evidence that the appellant had served under the Rhodesian regime and that the appellant was known to the authorities. I indicated to Mr Mtisi that those arguments had already been rejected by the First-tier Tribunal in the appellant's case in 2010 and that there was no evidence on the finding of the judge that the appellant had been in the Rhodesian Army. Mr Mtisi in response submitted that there is a deteriorating situation in Zimbabwe and that the military are subject to being stopped and questioned. His reading of the First-tier Tribunal decision was that it did not indicate that the judge considered that the appellant had not been in the Rhodesian Army. I indicated to Mr Mtisi that having considered the papers it did not appear that the case was put on the basis of military involvement before the First-tier Tribunal Judge. Mr Mtisi referred me to paragraph 3 of the appellant's witness statement and submitted that it was clearly open to the judge to reconsider the appellant's military involvement.
9. It is asserted in the grounds that the judge erred in going behind the respondent's concession that the appellant had established family life with his partner Ms J. It was also asserted that the Tribunal erred in failing to consider material evidence regarding subsistence of the relationship. The grounds assert that the Tribunal's decision on subsistence of the appellant's relationship is inconsistent with the guidance in the case of **Fetle (Partners: two year requirement) [2014] UKUT 00267 (IAC)**. Mr Mtisi submitted that the appellant started cohabiting with Ms J in August 2010. There was evidence that the appellant was living with Ms J before the judge, namely the NHS letter. He submitted that there was a subsisting family life, a red herring had come up at the hearing because it became apparent that for a brief period the appellant's partner was in emergency accommodation necessitated by her illness. The judge's interpretation was that it was indicative that their relationship was no longer subsisting. He submitted that this was a perverse finding, there was

compelling evidence including supporting documents written, and oral evidence from the sponsor, as to why she was in emergency accommodation. From October 2014 the couple resumed cohabiting. Mr Mtisi referred me to page 10 of the supplementary bundle before the First-tier Tribunal which contained a letter from the NHS to the appellant at Ms J's address. He also submitted that a fax to the Tribunal of 6 May confirmed the appellant was residing at that address. That was the request for an adjournment. He submitted that the notice of appeal confirmed the appellant was residing at that address and all the court notices were sent to the appellant at that address. Mr Mtisi also handed up the appellant's driving licence which was issued on 24 October 2014 giving the address as []. Mr Mtisi accepted that that evidence was not before the First-tier Tribunal Judge but asked for it to be taken into consideration if a material error of law was found.

10. It is asserted that the fact that the appellant's partner has recourse to public funds does not exclude the appellant from Appendix FM as his partner is a recipient of personal independence payment. He submitted that the judge took issue with the fact that the appellant's partner had stopped working and that it was implicit from that that the judge was considering adequacy of support and maintenance. He asserted that the Secretary of State's own guidance specifically exempts those in the sponsor's circumstances from having to prove ability to maintain a partner. He submitted that there was evidence that the appellant was in receipt of enhanced benefits. I asked Mr Mtisi if the claim had been approved at the date of the hearing. He submitted that at the time of the hearing there was evidence in that it came up in the witness evidence. He then rephrased his submission to say that what we have is confirmation that she was under assessment at the date of the hearing. He submitted that the judge did not fully engage with EX1. The appellant and the sponsor had been in a relationship for five years at the date of the hearing. He submitted that it was an important factor that the sponsor was not someone who historically had been reliant on benefits. This had only started after experiencing a bereavement and she had been in receipt of benefits for just under a year.
11. It is asserted that there was ample medical evidence pertaining to both the appellant and Ms J which was of significance to assessing whether there were insurmountable obstacles to continuation of family life. It is asserted that the Tribunal erred in failing to consider and make reference to the medical evidence attached to the application for an adjournment lodged on 6 May 2015. The grounds assert that the decision is materially flawed as inconsistent with the guidance in **SS (Congo) [2015] EWCA Civ 387** and **Agyarko [2015] EWCA Civ 440**.
12. The grounds assert that the Tribunal's decision to dismiss the appeal under Article 8(2) right to family life is fundamentally flawed and inconsistent with the guidance in **AB (Jamaica) [2007] EWCA Civ 1302** in assessing proportionality. The grounds assert that the respondent's decision portrays a cavalier treatment of the appellant's partner's rights within the meaning of **AB (Jamaica)** particularly given that the appellant's partner is settled in the UK, has been residing here for many years, is studying in the UK, has family in the UK and now considers the UK to be her home. Mr Mtisi submitted that the key issue was whether or not the sponsor could relocate to Zimbabwe. He submitted that the evidence, including the medical conditions

afflicting both the appellant and sponsor and the difficulties that they would face, were not engaged with by the judge. Although the judge sets out that there are medical facilities in Zimbabwe he does not engage with the claims by both the appellant and the sponsor that they would be returning to starting life in a state of destitution. Both have infirmities, both are presently unable to work. He asserted that there was an inadequate consideration of the impact of relocation on the sponsor who is a British citizen with the legitimate right to be in social housing. He submitted that it would be contrary to public policy for her to be compelled to leave the UK.

The Respondent's Submissions

13. The respondent filed a Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. The respondent asserts that the judge was correct to observe that there had been a fundamental change in circumstances since the Secretary of State accepted that there was a genuine and subsisting relationship. The respondent asserts that the judge was entitled to reach the conclusions she did on the relationship. Further it is asserted that the judge made an alternative finding at paragraph 84 that it would not be unreasonable for them to live together in Zimbabwe.
14. In oral submissions Ms Fijiwala submitted that at paragraphs 81 and 82 of the decision the judge analysed the evidence and found that there was no documentary evidence that the appellant was living with Ms J. She referred to the judge's finding that the oral evidence of the appellant was vague when asked if the authorities knew he was residing there. The judge records that in March 2013 the sponsor was representing herself to the authorities as a single homeless person. The judge was entitled to take into consideration that two different accounts had been given to two different authorities and therefore the credibility of the appellant was undermined. The circumstances had changed since the Reasons for Refusal Letter and the judge was obliged to consider the circumstances at the date of the hearing. The judge did not consider the lack of maintenance because the judge was not able to go through the route having found that the sponsor and the appellant were not in a genuine and subsisting relationship. She submitted that the judge could have gone further and found that the eligibility requirements were not met. She submitted that at paragraph 83 the judge considers insurmountable obstacles. She submitted that even if the judge was in error with regard to appendix FM there has to be insurmountable obstacles which the judge considers at paragraphs 83 and 84. When considering Article 8 outside of the Rules the judge again makes reference to the medical issues and the availability of medical treatment in Zimbabwe. At paragraph 93 the judge considers the evidence at its highest. She submitted in response to Mr Mtisi's submission that the appellant and the sponsor would be destitute on return, that at paragraph 79 the judge notes that both the appellant and the sponsor said that they intended to work. With regard to the evidence of PIP she submitted there was only evidence that the sponsor had applied but that an assessment had not yet taken place. At paragraph 84 she submitted the judge considers that the appellant has accommodation and family in Zimbabwe so that it is not clear where Mr Mtisi's submission that they would be destitute has come from.

15. Ms Fijiwala submitted that I should not go behind the previous determination on the appellant's claim to be at risk of persecution. The main findings were set out at paragraph 55 by the First-tier Tribunal in this case where the judge set out that the First-tier Tribunal Judge in 2010 had found it incredible that the appellant was in the Rhodesian Army. That decision was not appealed any further. She submitted that it is clear that the judge found, regarding sur place activities, that the appellant was vague (see paragraph 66) and at paragraph 70 the judge found that the appellant had no genuine political affiliation.

Legislative Provisions

16. As from 28 July 2014 statutory provisions in a new Part 5A of the 2002 Act (inserted by s.19 of the Immigration Act 2014) requires, in legislative form for the first time, the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

17. Section 117A sets out the scope of the new Part 5A headed "Article 8 of the ECHR; Public Interest Considerations" as follows:

(i) 117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

18. The considerations listed in s.117B are applicable to all cases and are:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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.

19. Relevant Immigration Rules

EX.1. This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

Discussion

Risk on Return to Zimbabwe

20. There were two aspects to this ground of appeal, one set out in the written grounds, which was that the First-tier Tribunal decision is unsafe, because at the date of the decision the appellant had associated with the MDC for more than four years in circumstances where his activities are likely to be known to the authorities. The second aspect was that submitted in oral submissions that based on the appellant's military involvement in the army in Rhodesia he would be at an enhanced risk on return. The First-tier Tribunal set, out from paragraph 55, the findings of Judge Telford in the appellant's 2010 appeal. Judge Telford had found the appellant's account to lack credibility throughout. Judge Telford had also found that the appellant realised that he could drip feed the respondent with multiple different applications to prolong his time in the United Kingdom. No appeal was made against that decision, and as the judge correctly set out at the end of paragraph 57, those findings remain intact as the statement of the facts as at 9 August 2010 the date of the hearing. Although Mr Mtisi submitted that his reading of the First-tier Tribunal Judge Telford's decision was not that he had rejected the evidence that the appellant served in the Rhodesian Army, I have considered Judge Telford's decision at paragraph 9 where the judge found:

"I find that the appellant can safely be returned as he has not established even on the low standard of proof that he was a member of the Rhodesian Army."

21. In light of that finding Mr Mtisi's submissions that the appellant would be at an enhanced risk of return to Zimbabwe on the basis of his membership of the Rhodesian Army must be rejected.

22. With regards to the appellant's sur place activities the First-tier Tribunal Judge considered in detail, from paragraphs 60 to 73, the appellant's evidence. This is a detailed account and analysis by the judge. The judge clearly has adequately considered the evidence of the appellant's claimed MDC UK activity both in respect of the documentary evidence and the appellant's witness evidence. The judge found that the appellant's evidence about his involvement with MDC Southend was implausible and vague and that the documents that he relied on lacked supporting detail when his evidence should have been clear if his account were genuine and credible. The judge considered the country guidance cases and relevant case-law, in particular **RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department (Appellant) [2012] UKSC 38** and found that the appellant's history prior to departure from Zimbabwe showed that he must have had a profile that is either neutral or supporting of the Zimbabwe state. He reached this finding on the basis that this was consistent with his work record of relatively high positions within the state or state linked companies between 1981 and 2000 and the fact that the appellant returned to Zimbabwe without encountering any difficulties entering and exiting in 2004, 2007 and 2008. He found that this was because the regime had no information on him which led them to conclude that he was worth investigation. The judge also considered the case of **CM** finding that the appellant, who has no genuine political affiliation to the MDC, would not engage in political activities likely

to attract the adverse attention of ZANU-PF. The judge noted that the appellant refrained from political activities until after his asylum claim was refused and appeal rights exhausted and that any involvement that he had had with the MDC in order to obtain the documents that he had lodged was an opportunistic attempt to elaborate an asylum claim based on sur place activities and not a genuine statement of political beliefs. These findings were fully supported by adequate reasoning and were entirely open to the judge.

Article 8 under the Immigration Rules

23. The judge was entitled to go behind the respondent's concession or acceptance that the appellant and the sponsor were in a genuine and subsisting relationship based on evidence that was put before him. However, I do consider that the judge did not take into account the letter from the NHS which sets out that the appellant's address is 20 Springfield Close. It is not clear that this particular document was drawn to the judge's attention as confirmation that the appellant was residing at the address of Ms J. Whilst the judge cannot be criticised for arriving at the conclusion that he did, based on the fact that the sponsor had quite clearly presented a state of affairs that was entirely contrary to the position now asserted, i.e. that she was a single homeless person. However, on the basis of the evidence of the NHS letter the judge's finding, that the appellant has not provided up-to-date documentary or independent evidence that he is in fact part of the same household as Ms J, is in error. However, the judge notwithstanding this finding, went on to consider that the respondent's decision was made on the basis of the relationship being genuine and insisting and considered the test of insurmountable obstacles in the 'partner' provision in EX.1. Therefore, that error was not material.
24. In oral submissions Mr Mtisi stressed that the issue of adequate maintenance was a key element of the appeal. He submitted that there was evidence before the First-tier Tribunal Judge that the sponsor was in receipt of enhanced benefits. He then rephrased his submission that what was before the First-tier Tribunal Judge was that there was confirmation that the appellant was under assessment. Clearly there was no evidence before the First-tier Tribunal Judge that the appellant was in receipt of Personal Independence Payment as she was only advised of that on 24 May 2015 after the date of the hearing. In any event the judge did not consider the maintenance requirements having found that the appellant and the sponsor were not in a genuine and subsisting relationship. Had the judge considered the matter, there would have been no error as the sponsor had not been granted an entitlement to PIP.
25. Putting aside the maintenance issue, the issue the respondent considered and the judge considered was EX1 of the Immigration Rules. The requirement in issue is that the appellant must be in a relationship with a qualifying partner and there must not be any insurmountable obstacles to their continuing family life in Zimbabwe.
26. The issue that the judge had to consider is whether or not there would be insurmountable obstacles to family life continuing outside the UK. In **R (on the application of Agyarko and others) v Secretary of State for the Home Department [2015] EWCA Civ 440, (2015) ('Agyarko')** the Court of appeal held:

[21] The phrase “insurmountable obstacles” as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an Applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.

[22] This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase “insurmountable obstacles” has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under art 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see eg Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34, para 39 (“... whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them . . .”). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para 117: there were no insurmountable obstacles to the family settling in Suriname, even though the Applicant and her family would experience hardship if forced to do so).

[23] For clarity, two points should be made about the “insurmountable obstacles” criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way ...

[25] ...The mere facts that Mr Benette is a British Citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there- could not constitute insurmountable obstacles to his doing so.’

27. In Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) it was held that the term ‘insurmountable obstacles’ in provisions such as Section EX.1 are not obstacles which are impossible to surmount: they concern the practical possibilities of relocation.
28. However, as held in Agyrako the test of insurmountable obstacles imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is **not** whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. It is a much more stringent test.
29. The First-tier Tribunal Judge considers, at paragraph 88, that the appellant was born in Zimbabwe, he has accommodation and family in Zimbabwe, he has a work record and that he would not be destitute on his return. The judge also found that Ms J was born in Zimbabwe and remained there for a significant period of her life arriving in the UK when she was almost 45 years of age. He found that she looked to a family member there when she wished to marry the appellant. The judge also considered the medical evidence, finding that it did not justify a finding of insurmountable obstacles. The judge notes at paragraph 79 that in her witness statement Ms J states that she hopes to return to work as does the appellant once his hip replacement operation has taken place. The judge found that the evidence about the customary

marriage shows that the sponsor and the appellant are socially and culturally tied to Zimbabwe where both have family.

30. In light of the authorities it is clear that the judge made findings that were open to her on the evidence available that the appellant and the sponsor would not face insurmountable obstacles to continuing family life in Zimbabwe. There was no material error of law on this issue.

Article 8 outside the Immigration Rules

Medical conditions

31. It was submitted that the medical conditions afflicting both the appellant and his partner and the difficulties that they would face, were not engaged with by the judge. In the case of **GS (India) & Ors v The Secretary of State for the Home Department [2015] EWCA Civ 40** the court held:

86. If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in *MM (Zimbabwe)* [\[2012\] EWCA Civ 279](#) at paragraph 23:

"The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

87. With great respect this seems to me to be entirely right. It means that a specific case has to be made under Article 8. It is to be noted that *MM (Zimbabwe)* also shows that the rigour of the *D* exception for the purpose of Article 3 in such cases as these applies with no less force when the claim is put under Article 8:

"17. The essential principle is that the ECHR does not impose any obligation on the contracting states to provide those liable to deportation with medical treatment lacking in their 'home countries'. This principle applies even where the consequence will be that the deportee's life will be significantly shortened (see

Lord Nicholls in *N v Home Secretary* [2005] 2 AC 296, 304 [15] and *N v UK* [2008] 47 EHRR 885 (paragraph 44)).

18. Although that principle was expressed in those cases in relation to Article 3, it is a principle which must apply to Article 8. It makes no sense to refuse to recognise a 'medical care' obligation in relation to Article 3, but to acknowledge it in relation to Article 8."

32. The judge at paragraph 93 found that even taking the evidence at its highest the appellant and the sponsor do not have serious medical conditions requiring long-term care. The evidence of the appellant and Ms J was that they both hoped to recover and return to work. The judge had found that the appellant has family in Zimbabwe and accommodation to return to – there was no evidence that the appellant would be destitute on return. As set out in **GS (India)** in medical claims Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships. No such factors have been identified in this case. The findings of the judge in relation to the medical conditions were ones that were open to her and no other finding could have been arrived at on the facts of this case in light of relevant case-law.

Proportionality Exercise

33. The appellant submits that the First-tier Tribunal Judge's findings on Article 8 outside the Immigration Rules are flawed and that the respondent's decision portrays a cavalier treatment of the appellant's partner's rights.
34. In terms of reasonableness of Ms J's return to Zimbabwe, the judge found that Ms J was born in Zimbabwe and remained there for a significant period of her life arriving in the UK when she was almost 45 years of age. The judge concluded, at paragraph 8, that the evidence did not demonstrate Article 8 family life. In the alternative the judge found that if she was incorrect then the second leg of the **Razgar** test is not met by credible evidence of interference in the family life actually enjoyed by the appellant. Given my finding that the judge erred in considering that the appellant and the sponsor were not in a genuine and subsisting relationship, the judge ought to have considered Article 8 in relation to family life when considering the proportionality exercise¹. However I do not consider that there was a material error of law because at paragraph 90 the judge went on to undertake the proportionality balancing exercise required as per the fifth stage of the **Razgar** test.
35. In any event in the assessment of proportionality the factors to be examined are likely to be the same in a case such as this regardless of whether family or private life is engaged. In the case of **Singh & Anor v Secretary of State for the Home Department** [2015] EWCA Civ 630 the court considered:

¹ I do not need to determine whether in principle the judge ought to have in fact considered Article 8 outside the Immigration Rules

25. However, the debate as to the whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case, in agreement with Sullivan LJ's comment when refusing permission to appeal the issue is indeed academic and clearly so. As the European Court of Human Rights pointed out in AA, in a judgment which I have found most helpful, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. I reject Mr Malik's submission that the Upper Tribunal Judge's assessment of proportionality was flawed because she, on his case wrongly, based it on the Appellants' private life rather than their family and private life. In my judgment, she took all relevant factors into account, and her conclusion on proportionality is not open to challenge. Indeed, I would go further. In my judgment, no reasonable Tribunal, on the facts found, could properly have come to a different conclusion.

36. As set out above the judge took into consideration a number of factors in addressing the proportionality exercise.
37. The First-tier Tribunal judge set out that he was required to take into consideration the public interest considerations in Section 117B of the 2002 Act. The judge noted that the appellant can speak English and has worked. Weighing against the appellant the judge noted that he had not provided evidence that he is currently financially independent. The judge found that little weight can be given to the relationship with Ms J because this was established after the appellant's asylum appeal was dismissed and after he was appeal rights exhausted.
38. Had the judge considered the appellant had established family life with Ms J Paragraph 117B(4) requires that little weight is to be placed on a relationship with a qualifying partner that was established at a time when the appellant was in the UK unlawfully. It is clear from the appellant's immigration history that as from 2005 he was in the UK unlawfully. Therefore, the judge was correct to place little weight on his relationship with Ms J.
39. The judge also weighed in the balance against the appellant that the public interest considerations, including the maintenance of effective immigration control, weighed against him. Given this appellant's poor immigration history, that factor weighs heavily against him.
40. The judge undertook the proportionality exercise weighing all the positive factors in favour of the appellant and those against. The conclusion reached by the judge, that the interference with private and family life was justified, is a finding that was open to her on the facts of this case.
41. In light of the public interest considerations set out in paragraph 117B and the fact that little weight should be afforded to the appellant's relationship with Ms J or to any private life in the UK, the appeal under Article 8 outside the Immigration Rules was bound to fail.

Notice of Decision

The appellant has not discharged the burden upon him of showing that there is any material error of law in the First-tier Tribunal decision, without which that decision is not susceptible to being set aside. The appeal is therefore dismissed. The decision of the respondent stands.

Signed *P M Ramshaw*

Date 15 February 2016

Deputy Upper Tribunal Judge Ramshaw