



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-003802
First-tier Tribunal No:
HU/57900/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

NOVUYO PARADZAYI
(no anonymity order requested or made)
Appellant (in the FtT)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent (in the FtT)

*For the Appellant: Ms K Stein, advocate, instructed by Tulia Group
Community Interest Company, Coventry*

For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Edinburgh on 20 March 2024

DECISION AND REASONS

1. The appellant, a citizen of Zimbabwe, appealed to the FtT against refusal of leave to remain as the spouse of her UK citizen husband, the “sponsor”.
2. Judge Doyle allowed her appeal by a decision dated 12 May 2023. Up to [15], he found that the circumstances fell short of the terms of paragraph EX.1(b) of the immigration rules.
3. He then said:-

[16]. The insurmountable obstacle is not found in the profile of either the appellant or her husband. The insurmountable obstacle to family life continuing in Zimbabwe

is found in the respondent's own guidance for British citizens travelling to Zimbabwe. That guidance tells me that the appellant's husband will be granted a 30 day visit visa, not a residence permit. The respondent's guidance merely says

For Information on how to apply for a work permit, apply for a residence permit or renew a residence permit you will need to contact:

Department Immigration Headquarters Corner Herbet Chitepo / Leopold Takawira, Harare, Zimbabwe

4. In absence of reliable evidence that the appellant's husband could live permanently in Zimbabwe, the appeal succeeded on an insurmountable obstacle to the continuation there of family life.
5. The SSHD sought permission to appeal to the UT on two grounds. Ground 1 is that the FtT placed the burden of proof on the SSHD, when it lay on the appellant. Ground 2 is deficiency of reasoning, in that the guidance did not say that the sponsor would be limited to a 30 day visit and did not exclude him from obtaining a residence permit.
6. FtT Judge Cox granted permission on 7 September 2023:

The judge arguably erred in law in finding that the Sponsor could only ... obtain a 30 day visit visa to Zimbabwe. The judge noted that "there is no reliable evidence before me from which I can find that the appellant's husband is entitled to live in Zimbabwe". It is arguable that the judge has inverted the burden of proof. It is arguable that the judge should have asked himself whether the appellant has established that her husband would not be entitled to reside in Zimbabwe for more than 30 days.
7. Mr Mullen said there was little to add to the grounds, which took two good points. There was nothing before the FtT to show that the sponsor could not live in Zimbabwe other than as a temporary visitor. That might have been established by expert evidence, but that would have been for the appellant to provide. The Judge rightly found nothing else to amount to insurmountable obstacle. The decision should be reversed.
8. The appellant's OISC representatives e-mailed to the UT the day before the hearing a "court bundle on which our client intends to rely". This does not comply with directions and contains no application to or justification for reliance on further evidence. It comprises a brief further statement from the sponsor that he has not found on the Zimbabwe government website evidence that he might settle there, and on calling "the Government ... they could not seem to advise me on the requirements". He takes the view that he is not entitled to live there. Two screenshots are attached, which take the matter no further.
9. Ms Stein did not seek to have these items admitted, for any purpose.
10. Ms Stein submitted as follows:

- (i) It was a bare assertion by the SSHD, without any evidence, that the sponsor might stay in Zimbabwe for more than 30 days.
 - (ii) There was inequality of arms between the appellant and the SSHD. It was within the SSHD's resources to bring evidence.
 - (iii) It should not be for appellants to instruct legal experts. It was simply unfair to expect such evidence from an appellant. In any event, this challenge was not in the grounds.
 - (iv) The burden of showing that the sponsor might reside in Zimbabwe was on the SSHD.
 - (v) The decision was made by a knowledgeable and experienced Judge. There was no allegation of perversity. He was entitled to resolve the facts as he did.
 - (vi) The decision turned on a validly reasoned finding of fact and should be upheld.
11. On further procedure, if error were to be found, Ms Sein left that to the UT. She accepted that there was nothing to justify the outcome apart from the non-availability of a visa for longer than 30 days. She asked for a resolution based simply on there having been no error of law.
12. Mr Mullen said in reply that in referring to how a matter of foreign law ought to be established, he was not seeking to introduce a new ground of appeal.
13. I reserved my decision.
14. The burden of proving a claim is generally on the party making it. This extends to article 8 as it does to protection and other cases coming before tribunals.
15. The appellant has pointed to no authority to the contrary, nor to any exception which might apply to her case.
16. Once an appellant establishes that a decision threatens to violate a right protected by article 8(1) of the ECHR, the burden moves to the SSHD to show that interference is justified, or proportionate, under article 8(2); but that happens only once the appellant has shown the primary facts.
17. The doctrine of equality of arms is directed principally at ensuring that both parties have a fair chance to make their case. That opportunity is built into the system of appellations and appeal.
18. The burden of proof mainly affects how the evidence emerges. Once all the evidence is out, only the most delicately balanced cases turn on where the burden lies.

19. Both parties in appeals of this nature have a duty to assist the tribunal to reach its decision.
20. Having made these basic observations, it is also true that the SSHD has greater resources than individual appellants. I would be reluctant to interfere with the outcome if it depended on a fine ultimate balance of the evidence.
21. That is not the case here. Ms Sein strove valiantly to justify the outcome, but the information founded upon by the Judge simply does not say that the sponsor will be granted only a 30 day visit visa and will not be granted a residence permit. It clearly implies that longer permits *are* available. It states where further enquiries might commence.
22. Ms Stein was correct in not seeking to rely, for any purpose, on the further bundle which was tendered. There is nothing in it relevant to error of law, and nothing to bring the appellant's case close to establishing an insurmountable obstacle.
23. Proof of foreign law, by way of a report from a qualified expert, is one way, but not necessarily the only way, in which the appellant might have tried to establish the existence of an insurmountable obstacle. I do not consider that the SSHD was trying, in substance, to argue a further ground.
24. At [16 - 18], the FtT erred on the burden of proof. Ground 1 is made out.
25. Even without that error, the evidence cited by the FtT was not legally adequate to support its conclusion. Ground 2 is also established.
26. It is easy to see that the appellant and sponsor prefer the prospect of carrying on their family life in the UK rather than in Zimbabwe, but the rules set a stringent test. The evidence discloses nothing which meets that test.
27. The outcome, inexorably, is that the decision of the FtT is set aside and the appeal, as originally brought to the FtT, is dismissed.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
25 March 2024