IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04238/2014

THE IMMIGRATION ACTS

Heard at Glasgow
On 27 March 2015

Determination Promulgated
On 28 April 2015

Before

Upper Tribunal Judge Dawson

Between

MELUSI NDIMANDE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Winter, instructed by Peter G Farrell Solicitors
For the Respondent: Mr M Mathews, Senior Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. This appeal concerns a fairness challenge to a finding of the First-tier Tribunal panel (comprising Judges J C Grant-Hutchison and A Green) that the appellant, a national of Zimbabwe, was not in a subsisting relationship with his wife, Ms Ncube.

2. The background is that the appellant had appealed a decision dated 9 June 2014 to remove him on the basis of rejection of his refugee, humanitarian and Article 8 grounds. The Tribunal concluded the appellant had no

Convention reason for his fear and in any event there was no reasonable likelihood of his persecution on return. It also found there was no real risk of serious harm under the humanitarian protection provisions. Likewise the Tribunal concluded that the grounds relied on under Articles 2 and 3 were not made out. The residual appeal on Article 8 grounds with reference to the appellant's private and family life was also unsuccessful. The sole challenge relates to the family life element as was made clear in the grounds of application and by Mr Winter at the hearing.

3. Specifically the following assertions are made in the grounds:

   (a) The appellant and his wife were not asked questions regarding a letter of support from the Social Care Services of Glasgow City Council dated 16 September 2014 that had referred to the appellant's relationship with his ex-wife. This should have been brought to the attention of the appellant or his representative. Had that been done an adjournment may well have been requested for clarification. The same letter in any event referred to Ms Ncube as the appellant's wife.

   (b) The concerns by the Tribunal over the content of letters from four named individuals had not been put to the appellant and fairness required that they should have been.

   (c) The Tribunal had "totally" overlooked material evidence comprising a letter from a fifth individual in the Home Office bundle which confirmed the couple were married and were "dedicated to each other".

   (d) The Tribunal appeared to have ignored "crucial evidence" in the statements.

   (e) The Tribunal had erred in concluding that the only evidence of cohabitation was a gas bill. Material evidence had been overlooked or ignored with reference made to a marriage certificate showing that the parties reside at the same address in Glasgow and were married 29 July 2011.

4. In the course of Mr Winter's submissions I examined each of the items of evidence relevant to the unfairness challenge on the basis of the guidance given by Lord Reed in *HA v SSHD* [2010] CSIH 28. The points arising are considered below.

5. In response, Mr Mathews argued that the challenge was a disagreement with findings on the evidence dressed up as a fairness challenge. The relationship concerns were fairly put in the decision letter and the Tribunal had looked at the evidence in some detail. The reference to *Mehmet Kocer (AP) v SSHD* [2005] CSIH 41 as referred to in the grounds was misconceived (as accepted by Mr Winter in the light of the observations of Lord Reed in *HA*).

ANALYSIS

6. Lord Reed observed at [7] in *HA* that:

> "…The Tribunal may identify an issue which has not been raised by the parties to the proceedings, but it will be unfair, ordinarily at least, for it to base its decision upon its view of that issue without giving the parties an opportunity to address it upon the matter. …"

7. He also observed at [8]:

> "As an expert body, the Tribunal is entitled to reject evidence notwithstanding that the evidence has not been challenged before it. Fairness may, however, require it to disclose its concerns about the evidence so as to afford the parties an opportunity to address them."

8. Additionally at [10]:

> "There is, on the other hand, no general obligation on the Tribunal to give notice to the parties during the hearing of all the matters on which it may rely in reaching its decision."

9. With reference to *R v Immigration Appeal Tribunal ex parte Williams* relating to inconsistency in the argument that the Adjudicator should have reminded the applicant of earlier accounts, Lord Reed observed that leave to apply for judicial review had been refused by Harrison J, who noted that the applicant had been represented by Counsel at the hearing and

> "…had had the opportunity to deal with discrepancies between his oral evidence and what had been said in his asylum application or in his interview. The Adjudicator was not bound, as a matter of natural justice, to point out the inconsistencies."

10. Lord Reed continued at [12]:

> "There is in general no unfairness in proceeding in that way, since an applicant can generally be expected to be aware that the Tribunal will have to assess his credibility, and the consistency of the account he has given in evidence with any previous accounts contained in the documents before the Tribunal will plainly be relevant to that assessment. …"

11. He continued at [13] in these terms:

> "…There are, however, circumstances where, as a matter of fairness, the Tribunal cannot remain silent in the face of the evidence presented to it. One example of such circumstances has already been given, in the case of Kriba v SSHD. Other examples can be found amongst the reported decisions, such circumstances are fact-sensitive. The Tribunal is not under a general obligation to air its concerns about the evidence presented to it, even if the evidence is unchallenged. …"

12. As accepted by Mr Winter there is no question that the Tribunal had identified an issue which had not been raised by the parties. The reasons letter that accompanied the decision makes the respondent's position plain as to the relationship on which a grant of leave on Article 8 grounds had been sought. It refers to the claim by the appellant that he had customarily married Ms Ncube in December 2008. She had been granted

asylum and leave to remain in February 2009 and had now been granted indefinite leave to remain. A statement from Scottish Gas dated October 2010 had been submitted to confirm the couple were living together and in addition three letters of support from friends. Specifically as to the relationship the respondent had this to say:

> "44. Accordingly your client's application has been reconsidered on the basis of the information already received. It is noted that very little evidence has been provided to confirm your client's relationship with Ms Ncube is genuine or subsisting. It is further noted that the address held on the Home Office database for your client is different to the one held for his wife/partner, Ms Ncube, when your client has previously claimed that they had been living together since December 2008."

The respondent also observed at [48] that it was

> "… noted that your client has failed to provide sufficient evidence of any subsisting relationship with his partner Shile Ncube. Your client therefore fails to fulfil E-LTR.1.7 of Appendix FM of the Immigration Rules."

13. After considering paragraph EX the respondent continued at [50]:

> "As previously stated your client has failed, after several requests to provide sufficient evidence to confirm that he is in a genuine and subsisting relationship akin to marriage with his partner Shile Ncube. No evidence of insurmountable obstacles had been provided as to why your client and his partner cannot continue their family life outwith the United Kingdom. Your client therefore does not meet the requirements of EX.1 of the Immigration Rules."

14. Turning to the specific evidence which it is contended gave rise to unfairness, the first challenge relates to the treatment of the Social Services letter. Prior to addressing this point the Tribunal had at [34] set out their concerns regarding the absence of documentary evidence to show that the parties had ever lived together but for one gas bill in autumn 2010. They referred to a letter dated 21 October 2010 (which had been produced to the respondent) that confirmed the couple had entered into a customary marriage; the Tribunal observed that there was nothing to confirm that the parties have lived together since. A letter from another individual dated 29 October 2010 (also in the respondent's bundle) had described the couple as dependable, honest, peace-loving and courteous but it did not say that they had lived together. The Tribunal observed there were no more recent letters from either person to confirm that the parties' relationship was subsisting. Statements in the form of letters from the appellant's two cousins had made no mention of Ms Ncube at all.

15. The Tribunal observed at [35] that by their own account the relationship between the appellant and Ms Ncube had been difficult. Reference is made to his supplementary witness statement which stated that he had struggled with his relationship with his wife, the lack of income and financial pressures leading him to turn to alcohol.

16. After noting the appellant's criminal offending and the measures taken to address his alcoholism, the Tribunal then turned to the evidence of the parties in these terms:

> "Despite Ms Ncube's attendance at the hearing to give oral evidence in support of the appellant and their relationship we note that the parties continue to live apart. In fact in the said letter from the appellant's Social Worker she refers to the discussion she has had with the appellant in relation to 'his offending behaviour, his relationship with his ex-wife and his alcohol use' (our underlining). We find this calls into question whether the parties are in actual fact in a genuine and subsisting relationship. In his witness statement dated 22 July, 2014 the appellant says that when he was charged in relation to his conduct he had to live apart from his wife. There were bail conditions that they could not live together when he had to carry out his community payback orders. However as stated in the said letter from the Social Worker the appellant completed his order in August 2013 and yet they are still not living together. They appear to live apart because this allows the appellant to claim NASS support and yet the appellant's wife is working. Whilst we accept that Ms Ncube is also studying we fail to understand why they are not living together simply because of finance. Many couples and families struggle financially but do so together. There is no evidence of how often they are in contact with each other, how often they see each other and how they spend their time together as in any normal relationship."

17. After addressing the medical aspect arising out of both parties being HIV-positive the Tribunal concluded that it did not accept the parties were in a genuine and subsisting relationship.

18. The letter from Social Care Services does refer to Ms Ncube as the appellant's ex-wife but also in the following sentence to the appellant having "demonstrated increased insight into his behaviour within his relationship with his wife and his alcohol use".

19. A letter dated 12 December 2014 from Social Care Services does not seek to correct the reference to an ex-wife but explains that the appellant had separated from his wife for a period whilst he was subject to the order imposed by the court on 16 August 2012 but at the time of the end of the order the couple were reconciled.

20. In my view the Tribunal was entitled to note the reference to ex-wife in the context of the other aspects which concerned them. It was only one aspect of the evidence and by no means determinative. As Mr Winter accepted, the statements by the appellant are silent on the matters that concerned the Tribunal as to the nature of current contact. Likewise the statement by Ms Ncube explains her desire that he should be granted status so that he can start working. She continues that were he able to work it would make her life so much easier and that they could then afford to live together again.

21. As to the Tribunal's concerns regarding the letters from the four individuals, the appellant was capably represented and there is no

ambiguity in the reasons letter regarding the basis on which the relationship had not been accepted. That being so I do not consider it was incumbent upon the Tribunal to remind the appellant's representatives of the deficiencies in the evidence which were self-evident. The letter from the fifth individual, Effort Munzarikwa is also caught by the Tribunal's concerns about the absence of updated letters. There was no need for the Tribunal to refer to every single piece of evidence before it and it is difficult to see how this particular letter can be characterised as material.

22. The further complaint that the Tribunal had ignored crucial evidence in the statements was acknowledged by Mr Winter is not made out. The Tribunal was rationally entitled to observe that the couple were still not living together. The statement do not suggest otherwise.

23. Finally I do not consider the Tribunal erred in identifying that the only item of documentary evidence indicating the parties had lived together was the gas bill. The marriage certificate dated 29 July 2011 does record the couple as at the same address. That is merely an indication of an address provided by the parties and is of limited corroborative value.

24. My conclusion therefore is that the challenge does not identify any unfairness by the Tribunal, who gave cogent reasons on the evidence for concluding that the appellant had not established that the relationship was subsisting. No error of law came about in the Tribunal's decision. There is no other aspect of this decision which has been challenged. This appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed.

Signed Date 24 April 2015

Upper Tribunal Judge Dawson