Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07020/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th September 2015	**On 21st September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

Mrs Clay Mukundwa
[NO ANONYMITY DIRECTION MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Doerfel, Counsel instructed by International Care Network
For the Respondent: Mr Tufan Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Mrs Clay Mukundwa date of birth the 12th December 1990, is a citizen of Zimbabwe. Having considered all the circumstances I do not make an anonymity direction.

2. The appellant had applied for entry clearance to the United Kingdom as the spouse of a person or present and settled in the United Kingdom in accordance with Appendix FM of the Immigration Rules. By decision taken on the 23rd April 2014 the ECO refused that application. There had been an EC Manager's review of that decision and the reasons given for

maintaining the refusal were that the appellant had not proved that this was a genuine and subsisting marriage and that the parties intended to live together permanently in the United Kingdom.

3. The original refusal letter by the ECO had also taken issue with the employment of the sponsor and the ability of the appellant and the sponsor to meet the financial requirements of appendix FM and appendix FM-SE. However documentation had been submitted with the application and all of the documentation was reviewed by the ECM. On reviewing the documentation the ECM had conceded that the financial requirements of the rules were met. It appears that a letter required under the Rules had been provided from the employer and that letter confirmed the sponsor's employment and his salary and other documentation supported his claimed salary. The only outstanding matter was therefore the requirements relating to the marriage being genuine and subsisting and the parties intending to live together.

4. The appellant had appealed against the decision to refuse her entry clearance. The appeal was heard by Judge Trevaskis. By decision promulgated on 12 February 2015 the judge dismissed the appellant's appeal on Immigration Rules grounds.

5. By decision made on 30 April 2015 leave to appeal to the Upper Tribunal was granted. Thus the matter now appears before me as an appeal in the Upper Tribunal to determine in the first instance whether or not there were any material errors of law in the decision. If I find that there are material errors of law, in accordance with the direction sent out I could determine whether or not to re-determine the appeal on the basis of the evidence already lodged.

Consideration of Grounds of Appeal

6. The first point taken within the grounds of appeal is that the judge has raised paragraph 320 (11)(iv) of the Immigration Rules. It was a paragraph that was not raised within the refusal letter nor was it raised by the ECM review. Rule 320(11)(iv) provides:-

> ‘320 In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2 - 8 of these Rules, and subject to paragraph 321 below, the following grounds for the refusal of entry clearance or leave to enter apply:
>
> Grounds on which entry clearance leave to enter the United Kingdom should normally be refused:- ...
>
> 11 where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by...
>
> (iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary

> of State or a third-party required in support of the application (whether successful or not), and
>
> there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with read documentation process.'

7. The circumstances in which the judge raised the issue relate to the address given by the appellant on the visa application form. In the form at part 3 an applicant is expected to fill in their contact details. Part 3 commences by requiring an individual to *" Please provide your contact details in your home country"*. It then starts at Paragraph 3.1 requires an applicant to put in the full residential address and postal/zip code. The appellant has put in an address in Harare as a residential address and has stated in paragraph 3.2 that she has lived at the address since 2010.

8. Other family details are completed in Part 4 including identifying that her mother's family appear to emanate in part from Chimanimani.

9. During the course of the sponsor giving evidence the sponsor stated that the address of the appellant was in Chimanimani. The sponsor indicated that the address on the form was the address of a friend, which was used as a postal address because postal delivery in the rural areas was not reliable.

10. In dealing with that issue judge has noted the respondent's submissions at paragraph 17. There the respondent submits that the application should be dismissed because false information had been provided about her address in the present application. The judge in paragraph 32 finds that by virtue of rule 320 (11) (iv) that appellant has made a false statement in the application and has failed to explain that she had given that address in order to obviate postal difficulties. The judge finds that this is one of those grounds therefore where entry clearance should normally be refused.

11. A number of issues can be taken with the approach of the judge to that issue. The judge has considered the matter under immigration rules 320 (11)(iv). It is clear from the wording of the specific rule that the rule is intended to deal with the situation in which in a previous application an applicant has acted in a manner intended to circumvent or frustrate the intentions of the rules. The conduct complained of in this case relates to the specific application itself and not to a previous application. If the issue of dishonesty in the present application were going to arise the issue would properly be considered under paragraph 320(7A) but even there there would be a requirement of dishonesty.

12. As pointed out by the representative in the grounds of appeal there has to be a requirement of dishonesty in any finding with regard to paragraph 320(11). The requirement for dishonesty emanates from the case of **A v**

SSHD [2010] EWCA Civ 773. There appears to be no finding that the appellant had acted dishonestly.

13. There appears to have been an explanation for an address in Harare being given as the residential address. According to the information provided the appellant living in the countryside the postal service is problematic and therefore the address in Harare was the appropriate contact address. Nothing of any significance arises from giving an address in Harare or in Chimanimani.

14. Further with regard to the requirements of paragraph 320 (11) itself it does indicate that additionally to the false document or statement there have to be aggravating features as well. There do not appear to be any further aggravating features.

15. Accordingly in so far as the judge has found his decision in part upon paragraph 320(11) it appears that the judge has made a material error of law. It has to be said that such factors may have been relevant in assessing the issue of credibility of the appellant and had the judge limited himself to doing that it may be that no objection could be taken to what the judge has done. However the judge appears to have invoked paragraph 320(11) as a basis for dismissing the application but failed to notice the paragraph did not apply in the circumstances, failed to apply the requirement of dishonesty and failed to find any aggravating features.

16. As part of his basis for making adverse credibility findings the judge has relied upon the fact that the sponsor was reluctant to answer question about a conviction that he had over ten years ago. The judge at paragraph 21 refers to the sponsor being reluctant to answer the questions which is understandable but also to the fact that he took the view that a more serious charge had not been proceeded with. He suggests that he is entitled to take the fact that a more serious charge was dropped into account. He also takes into account the fact that the sponsor had been convicted of a criminal offence and sentenced to a term of imprisonment of eight months.

17. With regard to the Rehabilitation of Offenders Act 1974 the periods of imprisonment in excess of six months at below 2 1/2 years the rehabilitation period appears to be 10 years. According to Section 4 once the rehabilitation period has been reached an individual cannot be asked questions about it.

18. Further in examining the evidence it is suggested that the judge has failed to look at the evidence presented. In paragraph 24 the judge had claimed that the only evidence of communication which have been produced related to the periods since their marriage in September 2013. However in paragraph 26 the judge actually refers to the printout of communications beginning on 28 September 2012 and ending on 3 June 2013. That clearly is inconsistent with what is set out in paragraph 24. The documents produced in that regard are quite extensive and clearly show the

developing relationship and the fact that the parties arranged to meet each other in South Africa.

19. The judge within paragraph 24 had also referred to the fact that there were no alleged photographs of the marriage ceremony. Again this was incorrect in that there were 19 photographs from the wedding which had been included in the respondent's bundle at E51

20. On the basis of the challenges made to the determination there are clear errors of law. I have decided that the determination cannot stand.

21. At the hearing I invited the parties to make submissions with regard to how I should deal with the appeal if I were to find that there were clear errors of law. The respondent's representative submitted that he stood by the refusal letter and the review by the ECM. The appellant's representative pointed out that substantial amount of evidence submitted on behalf of the appellant and the sponsor.

22. There is a material error of law within the determination and the appropriate courses for the appeal to be re-determined.

23. The only issues, which are genuinely live between the parties with regard to this appeal, are whether this is a genuine and subsisting relationship and whether the parties intend to live together permanently. In assessing that one has to look not only at the relationship as it develops before the parties married in September 2013 but their conduct after.

24. The parties have known each other. The evidence indicates that prior to the sponsor coming to the UK the sponsor was brought up in the same village as the appellant. Their families knew and know each other. Indeed the appellant is currently looking after the sponsor’s children who have been left in Zimbabwe. The children will continue to be cared for by the parents of the appellant once she comes to the UK.

25. There is within the documentation submitted 82 pages of printout of communications from ‘Whatsapp’. Those commence on 28 September 2012 and run to 3 June 2013. While some of them have brief messages and replies it is clear that the parties have a developing relationship over that period of time. There are substantial communications above and beyond that which one would expect between merely friends. The conversation is clearly of individuals that are developing a substantial personal relationship and are more than mere friends.

26. Thereafter there are visits to see each other specifically to South Africa. On the second visit to South Africa the wedding took place by arrangement. There are a number of photographs the appellant and the sponsor. Reference to those photographs and indeed to phone cards is acknowledged in the reasons for refusal letter.

27. There is also a reference to the fact that the parties appear to have gone to Dubai and the United Arab Emirates for the period of 23 October to 4 November 2014.

28. This is a couple that have known each other before the sponsor left Zimbabwe.

29. The parties married in September 2013. The documentation confirms the marriage and confirms that they entered into a valid marriage. Thereafter the additional documentation goes on to prove that there was a relationship that developed before the marriage between two people, who knew each other well. The documentation continues to show contact and involvement between the appellant and the sponsor after the marriage. That includes the parties meeting in order to be together.

30. There is reference to the fact that the appellant had a stillbirth. There is no reason to question that. There is no reason to question either that the sponsor was the father of that tragic child.

31. Taking all the evidence into account I find that I am satisfied that the appellant and the sponsor have entered into a valid marriage. I find that this is a genuine relationship between people that knew each other for a long period of time and have renewed their relationship and that relationship has developed. They have married and I am satisfied that it is a genuine and subsisting marriage. Further taking into account all the evidence I am satisfied that it is the intentions of the parties that the parties will live together in the future.

32. Accordingly having considered the issues raised by the ECO I am satisfied that all of the requirements of appendix FM and appendix FM-SE are satisfied. It has been conceded that all of the requirements other than those set out above were satisfied. The appellant met the requirements with regard to eligibility and suitability under appendix FM save for the challenges made. The sponsor has the financial means required under the rules.

33. Accordingly taking all the evidence into account I find that the appellant meets all the requirements of the rules. I therefore allow the appeal under the immigration rules.

Decisions

34. There is a material error of law in the original decision. I substitute the following decision

    a) I allow the appeal under the immigration rules.

    b) I make no anonymity direction.

    c) I make no fee award.

Signed Date

Deputy Upper Tribunal Judge McClure