OSITA BONIFACE UZOIGWE
and
MARTHA UZOIGWE
versus
PRINCIPAL DIRECTOR OF THE IMMIGRATION DEPARTMENT
and
MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 1 June 2016

Unopposed Matter

Ms *I Liss*, for the applicants
No appearance for the respondent

MATANDA-MOYO J: This is an application for setting aside the decision of the first and second respondents declaring the first applicant a prohibited person and ordering his deportation from Zimbabwe.

The applicants are husband and wife, married in terms of the Marriage Act [*Chapter 5:11*], on 15 September 2008- Marriage Register number 1446 refers. The first applicant is a Nigerian citizen and the second applicant a Zimbabwean citizen. The two applicants allege that at the time of the marriage, the first applicant was lawfully resident in Zimbabwe. However, no meaningful evidence has been put forward to support this assertion. The only evidence proffered are two letters from Immigration Department, one calling for submission of certain documents and the other purportedly advising Ideal Clothing and Manufacturing (Pvt) Ltd that their application for a temporary employment permit for the first applicant had been approved for period 18 December 2007 to 18 December 2008. The portion on permit number is blank. The applicants have failed to provide even the passport proving the fact that indeed the temporary

employment permit was granted. I hold the view that at the time of the marriage the first applicant was in Zimbabwe illegally.

The two applicants have two children of the union namely H born XX XXX 2009, and H born XX XXX 2011. After the marriage to the second applicant, the first applicant sought a residence permit on the basis of such marriage. Again no proof of such application was tendered before the court. A reading of the first applicant's founding affidavit tend to show that the applicant believed that marrying a Zimbabwean citizen automatically conferred permanent residence status on him. I am of the opinion that no such application was ever made resulting in him being deported from Zimbabwe on 18 March 2009. The first applicant admits in his affidavit that he was advised to apply for a residence permit from Nigeria.

Acting contrary to such advice, the first applicant re-entered Zimbabwe in April 2009, in contravention of his status as a prohibited person. He was again deported in 2011. He again re-entered Zimbabwe in 2013 without regulating his status and in violation of his status as a prohibited person. The first applicant was arrested and convicted on 27 July 2015 for re-entering/remaining in Zimbabwe as a prohibited person contrary to the Immigration Act, and was sentenced to two months imprisonment. He is currently in prison pending deportation. The first applicant has not appealed against that conviction and sentence.

On 22 September 2015 the first applicant petitioned the second respondent for the revocation of his status as a prohibited person and his deportation. No response has been received from the second respondent.

I am of the opinion that the applicants have adopted the wrong procedure. Part IV of the Immigration Act [*Chapter 4:07*] provides for appeals and reviews. Section 21 provides:

> "21 Appeals
> (1) Subject to subsection (2), subsection (2) of section eighteen and section twenty two, deny person who receives notice in writing in terms of paragraph (a) of subsection (4) of section eight that … or that he is a prohibited person, may appeal to the nearest magistrate court against … the allegation that he is a prohibited person as the case may be. …"

The section provides for referral of matter to the Supreme Court on points of law.

Section 23 provides for persons declared as prohibited persons to make representations to the Minister within 24 hours of being served with the notice declaring him as a prohibited person.

It is common cause the applicant did not appeal the decision and neither did he make representations to the Minister at that time. The letter by the first applicant to the Minister of 22 September 2015 is thus hopelessly out of time.

Section 26 of the High Court Act [*Chapter 7:06*] confers upon this court powers to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. Section 27 of the High Court Act provides for the grounds upon which this court can exercise powers. It provides;

> "27 Grounds for review
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decisions mat be brought on review before the High Court shall be-
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case maybe;
> (c) gross irregularity in the proceedings or the decision."

Section 28 deals with the High Court powers of review of criminal proceedings.

The applicants do not seek review of criminal proceedings before the magistrates. The applicants state that they seek no review in terms of the above section. The concession was well made as the application falls outside that ambit. Besides reviews have the time limits within which to be filed and no application for condonation has been granted by this court for applicant to bring such review.

However a reading of the draft order sought qualifies this application as a review. The applicants seek the court to review the deportation order against the first applicant. I am of the view that the application for review was brought way out of time and is improperly before court without applicants having applied and got condonation from court.

In case I am wrong in my view that the application is one for review and that the application is improperly before me. The application still fails on the merits on the reason that the order sought by the applicants is incompetent. This court cannot usurp administrative functions and grant residence permit to the first applicant. That function can only be done by the first respondent upon carrying out certain inquiries. The first applicant submitted that the order declaring him as a prohibited person violates the second applicant's constitutional rights to reside in her country of nationality. See s 66 of the Constitution. The applicants also allege such an

order violates s 81 (1) (d) of the Constitution, s 78 (1) of the Constitution and s 15 (2) (d) of the Immigration Act.

It is common cause that at the time of the marriage between the applicants, the first applicant was in Zimbabwe unlawfully. In the case of *Nomsa Jonasi-Ogundipe* v *Chief Immigration Officer and Others* SC 13/05 Gwaunza JA commenting on a marriage entered into whilst the applicant's husband was unlawfully in Zimbabwe had this to say;

> "In the absence of any proof that Samson was in Zimbabwe lawfully at the time of the marriage, I find that he was at that time an illegal immigrant. In terms of section 14 (1) (i) of the Immigration Act, [*Chapter 4:02*] that fact, per se, rendered him a prohibited person. The section reads as follows:
> (1) subject to this Act, the following persons are prohibited persons
> (h)
> (1) any person who has entered or remained in Zimbabwe in contravention of this Act or a repealed Act, whether or not he has been prosecuted for such contravention."

The submissions by the applicant that the official decision declaring him a prohibited person was contrary to s 15 of the Immigration Act [*Chapter 4:02*] is not sustainable as the applicant has failed to show that at the time of the marriage he was lawfully resident in Zimbabwe. The evidence and indeed by the applicant's own concession the applicant was unlawfully resident in Zimbabwe. The applicant has failed to even attach the initial temporary residence permit he claimed he had. This court can only infer from the initial temporary permit, that such temporary permit was never in existence. An unlawful immigrant has no rights which flows from the laws which he has breached. He remained an unlawful immigrant who was subject to deportation. The first applicant could only regularise his stay from outside Zimbabwe.

A marriage by an unlawful immigrant does not convert his status to a lawful immigrant. The first applicant remained an unlawful immigrant from the time he entered Zimbabwe illegally and remained so even after his marriage to the second applicant. Gubbay CJ as he then was in *Edwards* v *Chief Immigration Officer* 2000 (1) ZLR 485 (5) at 487 E-F said;

> "In the absence of authority to the contrary, I find that marriage, per se, does not entitle an alien wife of a Zimbabwean citizen to reside in the country without the relevant permit issued in terms of the provisions of the Immigration Act and Regulations."

I do agree that the applicants enjoy a constitutional right to found a family and that their children have rights in terms of s 81 (d) of the Constitution to family or parental care. However,

like all constitutional rights, those rights are not absolute and maybe limited in appropriate circumstances. Section 38 of the Constitution provides;

> "38 Citizenship by registration
> (1) Any person who has been married to a Zimbabwean citizen for at least five years, whether before or after the effective date, and who satisfies the conditions prescribed by an Act of Parliament, is entitled on application, to be registered as a Zimbabwean citizen."

It is clear from a reading of the above section that citizenship is bestowed upon application. There is no automatic citizenship conferred upon marriage. The first applicant's marriage to the second applicant did not have the effect of conferring citizenship upon the first applicant. Neither did it confer permanent residence on the applicant. In terms of the Immigration Act the first applicant is not entitled to a residence permit upon marriage.

In my view the applicant still has to make an application which would be considered by the respondents. In the result the first applicant is not entitled to an order for a residence permit.

Since the first applicant has failed to show that he is in Zimbabwe lawfully there is nothing which can stop his deportation. Any process can be done whilst in Nigeria.

Accordingly I order as follows;

The application is dismissed.

Zimbabwe Lawyers for Human Rights, applicants' legal practitioners