Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06477/2009

THE IMMIGRATION ACTS

Heard at Field House **Determination Sent**
On 21st June 2013 **On 8 August 2013**
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Before

UPPER TRIBUNAL JUDGE MARK O'CONNOR
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS ELIZABETH MUSADZIRUMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Phil Hayward, instructed by Turpin & Miller LLP
For the Respondent: Mr Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Zimbabwe born 30 September 1957. She entered the United Kingdom on 3 December 2000. Although the exact date of her entry into the United Kingdom is not clear from the papers before us (the dates referred to therein

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ranging from 2000 to 2002), it was agreed between the parties at the hearing that she had been here since at least 2001. It is not in dispute that she entered using a lawfully issued visit visa. She was subsequently granted leave to remain as a student 31 August 2006. She sought an extension of her leave by way of an application made on the 27 December 2006, but such application was refused in 18 January 2007.

2. The Appellant did not thereafter leave the country as required, and on 31 December 2008 she claimed asylum. The Appellant claimed, in summary, that she had worked for a printing company in Zimbabwe in the binding department. In order of priority, she undertook to print out some MDC leaflets whereupon she was confronted by eight men who entered the premises, claiming to be members of the "Border Gezi Youth League," which is an arm of the ZANU-PF. These men ill-treated her because their work had been relegated behind that of the MDC, "the Appellant tried to persuade them that she was only doing her job and that it was simply due to a difference between the times at which she had access to the materials" but "the men continued to make her interview uncomfortable and unpleasant," which led to there being "some veiled threats that they would be looking out for her and for other members of the printing works".

3. The Secretary of State refused the Appellant's application by way of a decision dated 1 July 2009, making a decision to remove the Appellant at the same time. The appellant appealed the Secretary of State's decision to the then Asylum and Immigration Appeal Tribunal.

4. The appeal has a chequered history. It was first heard by Immigration Judge Del Fabbro (as he then was) on 5th August 2009. The Immigration Judge dismissed the appellant's appeal on Refugee Convention, Humanitarian Protection and Articles 3 & 8 ECHR grounds, in a determination sent to the appellant on the 20 August 2009.

5. An order for reconsideration was made by Senior Immigration Judge Jordan (as he then was), on 10 September 2009. On 6 January 2010 Senior Immigration Judge McKee (as he then was) found material error in the determination of Immigration Judge Del Fabbro, in what was then known as the "first stage" of the reconsideration process. SIJ McKee concluded that the immigration judge had made no clear findings on whether the incident which allegedly caused the Appellant to leave Zimbabwe actually took place, where the Appellant would go on return to Zimbabwe, where the other members of her family were, and whether they had any problems with the authorities or with ZANU-PF. He indicated that the appeal would be re-heard de novo.

6. The appeal next came before Upper Tribunal Judge Perkins on 19th March 2010, in order that he may re-make the decision under appeal. The focus of this hearing was on the Appellant's claim under Article 8 ECHR. The judge reserved his decision.

7. On 8th February 2013, nearly three years later, Principal Resident Judge Southern issued directions observing (i) that the appeal had indeed been heard on 19th March 2010 and (ii) "for reasons that are not at all clear, nothing subsequently

happened.Judge Southern directed that the appeal should not be determined by Judge Perkins, and made a transfer order giving effect to such direction.

8. On 5th April 2013, further directions were given at a case management hearing to the effect that the parties be given the decision of Judge McKee dated 6th January 2010, which set aside the determination of Immigration Judge Del Fabbro; that the positive findings of fact made in that determination, as regards the incident described in paragraph 3 of the determination, should stand as a starting point for the Upper Tribunal's own factual findings; and that skeleton arguments be provided for the hearing in the Upper Tribunal.

Preliminary Issue

9. At the outset of the hearing before us issue was raised by the parties as to the scope of appeal. Mr Nath submitted that we ought to determine the appeal on a de novo basis, following a decision of Upper Tribunal Judges Kekic and Moulden made after a hearing on 14 May 2013. Mr Haywood asserted that the findings of fact made in the appellant's favour by Immigration Judge Del Fabbro ought to be maintained.

10. We pause at this point to observe that the handwritten record of proceedings of the hearing of 14 May 2013 clearly indicate that the panel concluded that the appeal should be determined de novo by the Upper Tribunal. However, no reasons are given for this conclusion within that record, although it does indicate that a written decision would be issued. This, though, was never done.

11. After some discussion at the hearing before us Mr Nath, whilst maintaining that the Tribunal's consideration ought to be on a de novo basis, nevertheless, sensibly accepted that even if this were the case the evidence before the Tribunal led to the inescapable conclusion that the appellant had credibly detailed the events she claimed had occurred prior to her departure from Zimbabwe. As a consequence of this concession there was no necessity for us to determine the issue set out above.

Opening Submissions

12. Given the complexity of the appeal we, thereafter, invited Mr Haywood to make opening submissions.

13. He firstly submitted that the Appellant was a refugee, following the decision in **CM (EM Country Guidance; Disclosure) Zimbabwe CG [2013] UKUT 00059**. This was said to be so because of the criminal activities of the Chipangano and the risk such activities would cause to the appellant. In support of his submission Mr Haywood took us to various passages within the decision in **CM (Zimbabwe),** including the following, found at paragraph 198 of the determination, "weighing the evidence, we find that Chipangano has been responsible for acts of violence and intimidation outside Mbare on limited occasions and largely in neighbouring suburbs such as Epworth and Highfields".

14. We observe at this stage however that whilst the decision in **CM (Zimbabwe)** refers to the criminal activities of the Chipangano, it also records in the next breath that, "there is scant evidence that Chipangano has any significant range or influence in low or medium density suburbs of Harare and their forays into the centre of the city are infrequent ..." (para 198).

15. Second, Mr Hayward submitted that there has been a "conspicuous unfairness" in the treatment of the Appellant because had this appeal been promptly dealt with by the Upper Tribunal the determination in **RN (Zimbabwe) [2008] UKAIT 00083** would have been extant and the Appellant would have succeeded in his appeal brought on asylum grounds.

16. Third, and in any event, Mr Hayward observed that the Appellant has an adult daughter, Florence Makumire, in the United Kingdom. He submitted that Ms Makumire's letter of support (see page 9 of the Appellant's bundle) leaves little doubt that the Appellant has a viable claim under Article 8 ECHR to remain in this country.

The Evidence

17. We have before us a bundle from the Secretary of State and a number of bundles from the appellant. These bundles are all indexed and as such we do not propose to list the documents contained therein.

18. We heard oral evidence from the appellant, Mr Philip Mugarawa-Gobru, Ms Emelia Luwizhi and Ms Florence Makumire.

19. The first witness was the Appellant herself. She adopted her witness statement dated 13th June 2013. She was directed to page 29 of the bundle where her witness statement confirmed that her house was demolished in Warren Park. At the time she had been married, however, with the destruction of her home, her relationship with her husband deteriorated. In response to the examination-in-chief, the witness confirmed that she and her husband separated in 2005 and she did not know where he was at present.

20. In cross-examination by Mr Nath the witness was asked whether after her alleged mistreatment by the "Border Gezi Youth League" she had been subjected to further difficulties. She explained that, "I had no political affiliations at the time. It was a simple misunderstanding that I could not get the books bound in time. It was nothing political. If I returned I don't know if I could go back there." She went on to confirm her relationship with her daughter (see her witness statement at page 25 of the supplementary bundle). She said that her daughter had helped her to cope emotionally with her time in the UK. Mr Nath put it to the witness that at page 11 of her daughter's witness statement dated 25th April 2013 her daughter had said that she would find it difficult to return to Zimbabwe to visit her mother because of the cost of airline flights; she had not referred to any political difficulties for either of them. The witness replied, "I don't know."

21. She was then asked what she intended to do in the UK if allowed to remain and replied that she would like to do something for herself by improving upon her education. She said she had no one in Zimbabwe because her three sons were all in South Africa and since her husband had remarried she had no contact with him.

22. We observed to the witness that the evidence before us suggested she had two nieces, Tendai and Memory, in Zimbabwe. The Appellant accepted that that was indeed the case.

23. In reply to the cross-examination, Mr Hayward asked the witness if Tendai and Memory could give her any assistance in Zimbabwe. The witness said that she had not spoken to them for a long time, when they were very young. She thought that they lived in Marandera. She said that Memory was aged 25 and Tendai was older and she did not know whether they worked. She had heard that Memory had married.

24. The second witness was Philip Mugarwa-Gobru, the Appellant's adult nephew. He adopted his witness statement (at pages 7 to 8 of the bundle) dated 13th June 2013. He had a 4½ year old son that his aunt, the Appellant, looked after when he was at work. He said that he was also doing a course in life chances at Birkbeck College, University of London and was starting another course at Queen Mary and Westfield College in biomedical sciences later this year. He said his partner was working, having finished the first year of a law degree. As both of them led busy lives, they looked to the Appellant to provide care for their 4½ year old son.

25. Mr Hayward asked the witness what impact the Appellant's return to Zimbabwe would have on their lives. The witness said that since his father passed away, the Appellant was the person who is there for them. They referred to his witness statement where he said that "she binds us together." He said that she was the eldest of the girls in their family. She was now the only one left in the UK. In any event, she had nothing to return to in Zimbabwe.

26. In cross-examination the witness was asked by Mr Nath whether he himself was in contact with anyone in Zimbabwe. He replied to say that he was in contact with church members because his grandfather was one of the founding members of their church and they are seen as the family of church leaders. Indeed, his aunt, the Appellant, also goes to church. He said that he was dependent upon the Appellant because since his father died, his mother in Zimbabwe had gone now to live with her family and she had maintained no connection with the Gobvu family. He confirmed that he last contacted his mother in 2000 in Zimbabwe. He said his aunt was not in touch with anyone in Zimbabwe. Having only been granted refugee status himself in 2010, the witness said that he had not returned back to Zimbabwe either.

27. He was asked what his aunt, the Appellant, does in his household. The witness said that, "she helps with the cleaning, helps with the child, drops him off at school, and picks him up." When Emilia Luwizhi [the Appellant's niece who is a student in

London] comes from London, the appellant and Emilia talk about Emilia's welfare and her studies.

28. The witness was asked why the Appellant did not apply for asylum earlier. He said he did not know. He was asked whether his aunt, the Appellant, had ever mentioned the incident in Zimbabwe to him. He said that this was the case. He knew that she had got into trouble while undertaking some printing work. He said, "she had a contract for the MDC and for ZANU-PF, but they printed all the MDC work first and not the ZANU-PF, and they got her into trouble with the former. She was stripped naked."

29. Finally, the witness was asked how he knew (as disclosed by paragraph 6 of his statement) that the Appellant would be subject to reprisals if she returned to Zimbabwe. He replied by stating that, "she has a phobia of going back" and that she was "emotionally disturbed" at the thought of returning back. There was no re-examination.

30. The third witness was the Appellant's adult niece, Emilia Luwizhi. She adopted her witness statement (at page 9 of the bundle). There was no further examination-in-chief, nor any cross-examination of this witness.

31. The fourth witness was Florence Makumire, the appellant's adult daughter. She adopted her witness statement (at page 11 of the bundle) dated 25th April 2013. In her evidence-in-chief, she confirmed that her son is currently aged 16 years and her daughter aged 7 years. She worked as a social worker.

32. The witness continued her evidence by asserting said that her mother helped her as a child carer, as she was struggling to build a career herself. She said that her mother was a "second mother" to her children. It was not financially viable for the appellant to go to live in Zimbabwe. She would also have no food and no transport facilities there. Her family in the UK would not be able to visit her. The family house had been destroyed in 2005 and there would be nothing for the appellant to return to. She said that she supported her brother in South Africa. She also said that one of her brothers in South Africa had died and the other one was looking after the children.

33. There was no cross-examination of this witness.

34. In response to a question from ourselves, the witness confirmed that when she and her family go on holidays, they take the Appellant with them because, "she is part of our family" and that "I want her to experience the holiday with us."

Closing Speeches

35. In his closing speech, Mr Nath, submitted that the Appellant could not qualify for refugee status and had no demonstrable risk of being ill-treated in Zimbabwe. She had worked in a printing company. She was molested simply because the Border Gezi Youth League, who were used to having their own way, found out that their printing material had not been processed. If the Appellant was subjected to

molestation it was not on account of political violence. The Appellant had no political profile.

36. The Appellant had today confirmed that other people were also working there but that nothing happened to anybody else in any event, whatever happened ten years ago and there were no further reprisals of any kind. She could not show a risk of ill-treatment upon return.

37. As for her Article 8 ECHR claim, it was asserted that this would now need to be assessed under the new Immigration Rules despite the decision in **MF (Article 8 – New Rules) [2012] UKUT 393**. Under paragraph 276ADE the appellant could not show that she had been in the UK for twenty years. She could not show that there were any "exceptional circumstances." Much of her life had been in Zimbabwe. It was true that she had been in the UK for some twelve and a half years now. However, the new Immigration Rules refer to "exceptional circumstances," and even if she had been looking after her family members in the UK, this was not "exceptional." She had not given evidence of any other activity that she performed that could be regarded as "exceptional." She had an interest in becoming a dental nurse, but that was not "exceptional." There was the issue of a delay of three years following the hearing before Senior Immigration Judge Perkins. That too, however, was not "exceptional."

38. The Appellant had arrived a visitor's visa and had then overstayed. She has family in Harare. Her nieces Tendai and Memory live in Zimbabwe. There is family support there. Even if there had been no delay, the Appellant would not have succeeded, because the refusal letter of 1st July 2009 made it clear that the Appellant's claim was without merit (see paragraph 40 onwards which refers to the relevant situation). Accordingly, if the steps in **Razgar** were applied with respect to Article 8 ECHR, all that the Appellant could show was that she has been here for twelve and a half years, and that she helps out with the care of a child, but nothing more. She could not succeed.

39. In his closing speech, Mr Hayward relied on the skeleton arguments before us. He emphasised the following points. First, the Appellant would be returning, having lived in a high density area Harare, to a situation where she had no family, and where she was in her 50s, and would have to fend for herself against the Chipangano.

40. Second, the Appellant could succeed under paragraph 395C of HC 395. There was a difference between this provision in the Immigration Rules and Article 8 ECHR. Article 8 ECHR looked at the wider picture. Paragraph 395C considered specific factors that had to be taken into account before removal. It was therefore more favourable to an applicant in some respects than Article 8 ECHR. A consideration of those factors would surely militate against the Appellant's removal.

41. Third, the Appellant's credibility was strong. She had made it quite clear that she was not political. She has said that she is not in the MDC. But, she says that she

cannot return. She left on the basis of her fear, and that fear is still ongoing. Mr Haywood took us to various country materials, including those contained at pages 73 74, 76, 79 and 81 of the appellant's bundle, which, he submitted, supported a conclusion that the Appellant could not reasonably return back to Zimbabwe. In this respect he observed the evidence contained within pages 116 and page 124 of the bundle were also important

42. Fourth, there are family life rights in play. The Appellant's family life is getting stronger because she is living with her family members, and looking after their children. She has been on holidays with her daughter and her family. She has participated in the development of the children over a lengthy period. Her family life cannot be replicated in Zimbabwe. She provides emotional support to the family in the UK. The cultural context of so doing was important.

43. Fifth, there had been a delay within the Tribunal Service since 2009 and the case of **Rashid [2005] EWCA Civ 744** confirmed that this could cause "conspicuous unfairness" to the Appellant and the consideration of her claim. We pause at this juncture to observe that after lengthy discourse with between the Tribunal and Mr Haywood, Mr Haywood indicated that the appellant was not pursuing the 'conspicuous unfairness' point as a freestanding argument, but that it was to be taken as a relevant factor in the consideration by the Tribunal of the Article 8 ECHR and paragraph 395C grounds.

44. Mr Hayward invited the Tribunal to allow the appellant's appeal.

Re-making the Decision

45. In re-making the decision, we proceeded, pursuant to Mr Nath's concession, on the basis that the account given by the appellant (in the evidence pre-dating the date of the hearing before us) of the events which caused her to leave Zimbabwe, was truthful. We nevertheless dismiss the appeal brought on the basis of the Appellant's claim to face persecution or ill-treatment were she to return to Zimbabwe. Our reasons are as follows.

46. First, in relation to the Appellant's claim that she faces a risk of ill-treatment in Zimbabwe, we make the following findings. The Appellant travelled to the United Kingdom apparently on her own passport. It is a matter of some intrigue as to what happened to that passport. It has not been produced before us. There has been no explanation as to its whereabouts. The Appellant's claim that she came on 3rd December 2000 was made in her screening interview. That claim changed during her asylum interview when the Appellant suggested that she had left Zimbabwe in September 2002. The inconsistency has not been explained in any credible manner, although as we have detailed above, it was agreed between the parties that the appellant had in fact been in the United Kingdom since at least 2001.

47. The appellant's asylum claim was based upon her producing leaflets for the MDC, whilst at the same time having an unfulfilled printing order from the ruling party. We accept that there is a reasonable likelihood that the Appellant was visited by the

Border Gezi Youth League in the way explained by Judge Del Fabbro at paragraph 3 of his determination. We also accept that she was questioned vigorously about her printing of the MDC leaflets and ill treated in the manner claimed. There is no credible evidence, however, that the company she worked for suffered any adverse consequences. The Appellant asserted at the hearing before us that the printing company had been closed down, however, this evidence had not previously been given and, in any event, the Appellant also stated that no reasons had been given to her for such closure. We further observe that the appellant left Zimbabwe after this incident using her own passport without any difficulties or problems.

48. The Appellant has family members still living in Zimbabwe and her sons lived there for some time after her departure, although they now live in South Africa. There is no evidence that these family members suffered any reprisals as a consequence of the Appellant's actions, or indeed that the authorities contacted the family members after the Appellant's departure from the country, looking for her. The whereabouts of the Appellant's husband is unknown. She has no political profile, and does not claim to have any. She is certainly not a supporter of the MDC. The Appellant lived in Warren Park, Harare (see answer to question 10 of the SEF) prior to coming to the UK, although this house was destroyed in 2005 for reasons unconnected to the Appellant's departure.

49. When coming to our conclusions we have applied the country guidance set out in the recent decision of **CM (Zimbabwe) [2013] UKUT 00059**. This confirms that, as a general matter, that there is now significantly less politically motivated violence in Zimbabwe than was previously the case and that the return of a failed asylum seeker from the United Kingdom, with no significant MDC profile, would, in general, not result in that person facing a real risk of having to demonstrate loyalty to the ZANU-PF.

50. In relation to return to Harare the tribunal in **CM (Zimbabwe)** concluded as follows:

> "A returnee to Harare will in general face no significant difficulties, if going to a low-density or medium-density area. Whilst the socio-economic situation in high-density areas is more challenging, in general a person without ZANU-PF connections will not face significant problems there (including a "loyalty test"), unless he or she has a significant MDC profile, which might cause him or her to feature on a list of those targeted for harassment, or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF, or would be reasonably likely to engage in such activities, but for a fear of thereby coming to the adverse attention of ZANU-PF."

51. The Appellant claims to come from a high density area. It is accepted that the situation of a returnee in these circumstances is "more challenging". We find, however, that the Appellant will not face a loyalty test if returned to Harare and not face any problems there significant problems as a consequence of her lack of support for the Zanu-PF. She has no MDC profile at all, still less a significant MDC profile.

52. We further note that the availability of food and other goods in shops has improved in Harare. There is, indeed, a large informal economy in Zimbabwe, which ranges from street traders to home-based enterprises, which returnees can expect to avail themselves of.

53. We were addressed specifically on the problems in Harare from the Chipangano. The issue of "problems in Harare" was specifically dealt with by **CM (Zimbabwe) [2013] UKUT 00059**. In its head note the tribunal gave the following note of caution in this regard:

> "In the light of the evidence regarding the activities of Chipangano, judicial-fact finders may need to pay particular regard to whether a person, who is reasonably likely to go to Mbare or a neighbouring high density area of Harare, will come to the adverse attention of that group; in particular, if he or she is reasonably likely to have to find employment of a kind that Chipangano seeks to control or otherwise exploit for economic, rather than political, reasons."

54. The origin, nature, and activities of the Chipangano were specifically considered by the tribunal in paragraphs 196 to 201 of its determination. It was noted that the Chipangano have been responsible for acts of violence and intimidation within Mbare, although such acts have occurred outside Mbare on limited occasions, although such events largely took place in neighbouring suburbs such as Epworth and Highfields. They do not have any significant range or influence in low or medium density suburbs of Harare. Their activities have not led to a significant rise in overall number of human rights violations in the city) and the evidence before the tribunal in **CM** fell short of showing that Chipangani is an arm of the Zanu-PF (paragraph 198)

55. The driving force behind the Chipangano is the "intent on self-enrichment .... at the expense of those working in transport and in the informal economy ... primarily in the high density area of Harare known as Mbare" (see paragraph 200).

56. The Appellant is not returning to Mbare or one of the areas neighbouring Mbare. WE find, on the evidence before us, that the appellant is not reasonably likely to seek employment of such a kind or in such an area so as to encounter Chipangano 'touts' Consequently, given what is said about the Chipangano in CM, we find that it is not reasonably likely that she is a risk of suffering treatment from Chipangano that would engage the Refugee Convention.

57. In any event, we find that the Appellant could return to a low density or medium density suburb of Harare, observing as we do so that her family home in the high density area of the city was destroyed in 20005. Such relocation would not, in all the circumstances of the case including those prevailing in Harare, be unduly harsh or unreasonable.

58. We therefore dismiss the Appellant's appeal brought on Refugee Convention, grounds.

59. As we have found that the Appellant is not a refugee, we must consider whether she qualifies for humanitarian protection. We find that the background country information evidence does not indicate that a person such as the Appellant would be at real risk of suffering serious harm. There is now a coalition government in Zimbabwe with power sharing between the leaders of the two major parties. The leader of the MDC has asked people settled abroad to return back to his country. Having found that the Appellant is not a refugee because she has not established a well-founded fear of persecution, by analogy, we find that the Appellant cannot qualify for humanitarian protection either.

60. We must also consider the Appellant's human rights claims. As we have found that the Appellant has not established a well-founded fear of persecution, by analogy, we find that her claim does not engage Article 3 of the Human Rights Convention either. We find that she would not face a real risk, if returned, of "inhuman and degrading treatment" in Zimbabwe. Accordingly, we find that the Appellant would not suffer ill-treatment contrary to Article 3.

61. Turning to Article 8 ECHR, the application of the 'new' family and private life related immigration rules (HC 194) to appeals against decisions of the Secretary of State made prior to the 9 July 2012 was considered by the Upper Tribunal [Upper Tribunal Judges Storey and Coker] in the reported decision of **MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC)**. The tribunal was not persuaded that the new rules had retrospective effect such that they were of application to decisions of the Secretary of State taken prior to 9 July 2012. It further concluded that the new rules were not conclusive of the Article 8 issue; there were two questions to be answered, (i) whether the decision is in accordance with the Rules and (ii) whether it is accordance with the law as interpreted by the senior courts whose decisions are binding. The tribunal noted a number of respects in which the new rules appeared to apply tests that have been disapproved of by the courts. This approach was endorsed in **Izuazu (Article 8 – New Rules) [2013] UKUT 00045**.

62. Despite that which is said above it is nevertheless plain that the content of the Immigration Rules properly informs the Article 8 assessment made outside of the Rules in that they identify with some specificity what the public interest is.

63. With that in mind we have undertaken a consideration of the appellant's claim under the current immigration rules and find that she cannot succeed under paragraphs 276ADE to 276DH or Appendix FM, including Section EX of that Appendix, of the Immigration Rules. She has not been here twenty years in residence. We do not find that the circumstances of her case can be described as exceptional.

64. We find, however, that the Appellant can succeed outside the Rules on the basis of the existing jurisprudence of Article 8 ECHR.

65. The Appellant has a substantial family and private life in the UK. We accept the evidence before us as to the extent and nature of such ties. The appellant lived with her daughter, Florence, from the time of her arrival in the United Kingdom until

December 2011. During that time she established a close bond not only with her daughter, but with her daughter's young children whom she took care of whilst Florence and her husband were at work. The youngest of Florence's children was born at a time when the appellant was already living in the family home.

66. In December 2011 the appellant's sister became seriously ill with cancer. The appellant moved to live with her sister and Emilia (her sister's adult daughter). She provided support for her sister and also for Emilia. The appellant's sister passed away in March of this year. Emilia moved to college accommodation in London and the appellant moved in with her nephew Phillip. She sees Emilia at weekends, and provides moral and emotional support to her. The appellant now looks after and cares for her nephew's child, who is aged just 4 ½). Philip stated, of the appellant, (at para 7 of his witness statement) that "she binds us together" because she is the eldest of those in the family, and she is now effectively the matriarch of the family. She looks after the family, she cleans the house, she drops the children to school and picks them up'.

67. In Navaratnam Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Arden LJ said as follows, when considering the issue of family life between an adult child and his parents:

> "[24] There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.
>
> [25] Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: see S v United Kingdom (1984). Such ties might exist if the appellant were dependent on his family or vice versa…"

68. In the same case Sedley LJ accepted the submission that 'dependency' was not limited to economic dependency, stating:

> "[17] But if dependency is read down as meaning "support" in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents in my view the irreducible minimum of what family life implies."

69. After a careful examination of both United Kingdom and European jurisprudence [an examination later approved of by the Court of Appeal in Shamilla Gurung & others], the Upper Tribunal [Lang J and UTJ Jordan] observed as follows in Ghising (family life-adults-Gurkha policy) [2012] UKUT 00160:

> "[62] The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than

applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). As Wall LJ explained, in the context of family life between adult siblings:

> "We do not think that *Advic* is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life it is sought to establish is that between adult siblings living together. In our judgment, the recognition in Advic that, whilst some generalisations are possible, each case is fact-sensitive places an obligation on both Adjudicators and the IAT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that Article 8 is or is not engaged in a given case." (*Senthuran v Secretary of State for the Home Department*)."

70. We find that looking at the family unit as a whole the appellant has more than the normal emotional ties with her daughter, her niece (Emilia) and her nephew (Phillip). She also has a significant and close bond with her nephew's child and with her grandchildren. We accept Mr Haywood's submissions that the appellant has established a family life in United Kingdom with these relatives. We find that there is a protected family life here and the support that she provides and receives is real and effective in the way that family life support normally is.

71. If we are wrong in this conclusion then such the bonds the appellant has formed with her relatives in the United Kingdom nevertheless plainly form a substantial part of her private life here.

72. Applying Lord Bingham's tabulation in **Razgar** (at para 17) we find that the proposed removal of the Appellant would be an interference by a public authority with the exercise of the Appellant's right to respect for private and family life. The interference caused by the appellant's removal would have consequences of such gravity so as to engage the operation of Article 8. The interference is in accordance with the law. It is common ground the Respondent's policy of immigration control is 'a legitimate aim in the interests of the economic well being of the country'.

73. The public interest in a firm a fair system of immigration control is considerable and we have borne fully in mind the terms of the immigration rules and the fact that this appellant cannot meet the requirements set out therein, when coming to our conclusions.

74. We have set out above the nature and extent of the appellant's family and private life ties to the United Kingdom. The weight to be attached to such ties is though reduced by the fact that they have been built up, at least since August 2006, at a time when the appellant had lawfully right to remain in the United Kingdom. We also recognise, however, that the appellant's appeal has remained in the Tribunal system for approximately 4 years through no fault of her own. She was not required to leave the United Kingdom during this time. In total the appellant has remained continuously living in the United Kingdom for over 12 years, although over half of her stay has been unlawful. We further take into account that although the appellant's return to Zimbabwe will not lead to a breach of Article 3 ECHR, the conditions in that country are still generally harsh and unpalatable.

75. Looking at all the matters in this case in the round, including those mentioned above, those raised by the Secretary of State in her refusal letter and those detailed by the representatives before us, we find, despite the considerable weight attached to the public interest, that, in particular, the length of the appellant's stay in the UK and the nature and extent of her relationships with her various family members, in particular the children in her family, that the appellant's removal from the United Kingdom is not proportionate to the legitimate aim sought to be achieved by the Secretary of State. We therefore conclude that the appellant's removal is unlawful under s6 of the Human Rights Act 1998 as being incompatible with her Article 8 rights and we accordingly allow her appeal.

<u>Decision</u>

The decision Immigration Judge Del Fabbro is set aside for the reasons already given.

The appellant's appeal is allowed on the basis that her removal is unlawful under s6 of the Human Rights Act 1998 as being incompatible with her Article 8 rights.

Signed	Date
Deputy Upper Tribunal Judge Juss	7th August 2013