Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16942/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 May 2014	**On 3rd June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS BRENDA MILIMO

Respondent/Claimant

Representation:

For the Secretary of State: Mr S Kandola, Specialist Appeals Team
For the Respondent/Claimant: Ms Pararajsingham, Counsel

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of State to refuse to vary her leave to remain. The First-tier Tribunal did not make an

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anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of Zambia, whose date of birth is 1 August 1966. She entered the UK on 22 July 2005 with a visa as a voluntary worker which was valid until 7 July 2006. She successfully extended her stay in the United Kingdom as a student, a student nurse and as a Tier 4 (General) Student. Her last grant of leave to remain as a Tier 4 (General) Student was made on 20 December 2011 for a period of two years. On 29 August 2012 she made an application for leave to remain as a Tier 4 (General) Student. The application was refused on 15 October 2012 as the Secretary of State was not satisfied that her Tier 4 sponsor had confirmed that the course for which her CAS had been assigned represented academic progression from her previous study, or met one of the exemptions. But she was not entitled to appeal against the decision, as she still had leave to remain.

3. Her existing leave to remain as a Tier 4 Student was curtailed on 4 December 2012. Following consideration of further representations on her behalf, the decision to refuse her application was maintained and she was given a new curtailment date of 2 February 2013.

4. On 21 December 2012 the claimant applied for discretionary leave to remain. In her application form, she said she was not currently in a relationship. But her only child was present in the UK as a student.

5. On 23 April 2013 the Secretary of State gave her reasons for refusing the application. Her application to remain had been determined under Rule 276ADE of the Rules by virtue of Rule 326B. She had not lived continuously in the UK for at least twenty years since initially entering the United Kingdom on 15 July 2006. At the time of her application she was aged 46. Having spent 39 years in her home country, in the absence of any evidence to the contrary, it was not accepted that in the period of time that she had been in the UK she had lost ties to her home country. The family life that she claimed to have with relatives in the United Kingdom did not constitute family life as determined in Appendix FM of the Rules. Therefore her application had been considered as a claim for private life only.

6. Her case had also been considered on an exceptional basis outside the Rules. The Secretary of State did not consider there were any exceptional, compassionate or compelling circumstances to take into account, and therefore she was not prepared to exercise discretion in her favour. It would undermine the purposes of the immigration system relating to Tier 4 (General) Students should the appellant be granted leave to remain outside the Rules purely for the reason that she could not meet the requirements of the Tier 4 Student Rules.

The Hearing before, and the Decision of, the First-tier Tribunal

7. The claimant's appeal came before Judge Seifert sitting at Hatton Cross in the First-tier Tribunal on 12 December 2013. Ms Pararajsingham appeared on behalf of the claimant, and Ms Jacob, Counsel, appeared on behalf of the Secretary of State.

8. At the outset of the hearing, Ms Jacob withdrew the decision to remove the claimant made under Section 47. So the hearing proceeded in respect of the substantive decision to refuse the claimant's application for variation of leave to remain.

9. The claimant relied on her relationship with her partner, Mr Paul Dixon. She had met him in August 2012 whilst shopping. They were in a relationship by November 2012, and had started cohabiting in December 2012. She said that she and Mr Dixon had formed a strong and durable relationship, particularly over the last year. She had a loving relationship with his grown up children and his grandchildren. She and Mr Dixon had the same social network, and enjoyed each other's company. They were cohabiting with the intention of getting married. She was a Christian with strong religious faith. When asked when they planned to get married, she said "not too long".

10. She said if she was removed from the UK this would cause Mr Dixon and his family much distress, and would put a strain on their relationship. She could not bear the thought of being separated from Mr Dixon and his family.

11. In re-examination, the claimant said she had been talking about Zambia when she had answered question 6.10 of the application form. What she was saying was that she was not in a relationship with a person in Zambia in December 2012. Earlier she had explained in cross-examination that she had not mentioned Mr Dixon in the application form as she did not want to look as if she was using him in order to stay in the UK.

12. Mr Dixon was called as a witness, and he said that he intended to marry the claimant during the next two years. There was no particular reason for waiting that long, except that it seemed a reasonable time after his late wife had passed away, which was on 29 March 2010. They had been married for 41 years. He said he had not thought he would have another relationship, but he had found and fallen in love with the claimant.

13. In her closing submissions, Ms Pararajsingham said it was not the claimant's case that she met the requirements of Appendix FM or paragraph 276ADE of the Rules. However, applying Article 8 case law, the claimant's studies and her relationship with Mr Dixon engaged Article 8 on family and/or private life grounds. The respondent's decision constituted a disproportionate interference with the claimant's Article 8 rights.

14. At paragraph 57 of her determination, the judge held as follows:

> Having considered the evidence as a whole and having considered, amongst other authorities, **R (Razgar) v SSHD [2004] UKHL 27** and **Beoku-Betts v SSHD [2008] UKHL 39**, I have reached a conclusion that the respondent's decision constitutes a disproportionate interference with Ms Milimo's right to private and family life. In reaching this conclusion I have also taken into account the rights of Mr Dixon to private and family life with Ms Milimo. On the particular facts of this case I consider that this couple has established a relationship engaging Article 8. As described in her

> evidence they met by chance in August 2012. At that stage Ms Milimo had leave to remain in the UK until the end of December 2013. Mr Dixon had been married for over 40 years when he lost his wife in tragic circumstances. He has two sons, daughters-in-law and grandchildren. All of them live in the UK. He thought that he would never have another relationship, but despite this, met Ms Milimo and they have established [a] loving relationship and a new life together. The relationship is accepted by his family.

15. The judge went on to observe that they had both expressed an intention to marry. She did not consider it was reasonable to expect Mr Dixon, a British citizen, to leave his children and grandchildren and all his established ties in the UK, in order to move to Zambia with Ms Milimo. She continued:

> It may be that Ms Milimo continues her studies at some point in the future. However, I do not consider her studies would have engaged Article 8 private life, and base this decision on the relationship established between Ms Milimo and Mr Dixon.

The Application for Permission to Appeal

16. The Secretary of State applied for permission to appeal, arguing that the First-tier Tribunal Judge had erred in law in her approach to the Article 8 assessment. **MF (Nigeria) [2013] EWCA Civ 1192** confirmed that the Rules were a complete code that formed the starting point for the decision maker. Any Article 8 assessment should only be made after consideration under the Rules. That was not done in this case. The Tribunal had erred in law by not having regard to the Rules and the subsequent proportionality assessment was unsustainable because of this omission. Furthermore it was made clear in **Gulshan [2013] UKUT 00640 (IAC)** that the Article 8 assessment should only be carried out when there were compelling circumstances not recognised by the Rules. In this case, the Tribunal had not identified such compelling circumstances and its findings were therefore unsustainable. **Nagre [2013] EWHC 720 (Admin)** endorsed the Secretary of State's guidance on the minimum exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh outcome.

The Grant of Permission to Appeal

17. On 15 April 2014 Judge Pirotta granted the Secretary of State permission to appeal on the grounds raised in the application.

The Hearing in the Upper Tribunal

18. At the hearing in the Upper Tribunal, I received submissions from both parties as to whether the decision of the First-tier Tribunal did, or did not, contain an error of law. I ruled in the Secretary of State's favour on this issue, and my reasons for finding an error of law are set out below. At my invitation, Mr Dixon was called as a witness to give evidence relevant to the remaking of the decision.

Reasons for Finding an Error of Law

19. An error of law is made out for the reasons given in the application for permission. It was not enough for the judge to acknowledge the concession made by Ms Pararajsingham that the appellant's Article 8 claim did not succeed under Appendix FM. The judge needed to ask herself why the claimant did not qualify for leave to remain under the partner route contained in Appendix FM, as the answer to that question might well be decisive of the Article 8 claim. The judge should not have gone on to consider whether the claimant succeeded in an Article 8 claim outside the Rules unless satisfied that the claim met the high threshold test propounded by Sales J in **Nagre**, and approved by the Upper Tribunal in **Gulshan**.

20. The proportionality assessment was also flawed in that the judge only considered the question of permanent resettlement by Mr Dixon in Zambia. The judge did not consider at all whether it was proportionate to require the claimant to return to Zambia on a temporary basis, with a view to Mr Dixon supporting an application by her for entry clearance as his spouse or as his fiancée.

The Remaking of the Decision

21. The claimant cannot avail herself of the partner route in Appendix FM, as Mr Dixon does not meet the definition of a partner contained in GEN 1.2. This provides that for the purposes of Appendix FM "partner" means – (i) the applicant's spouse; (ii) the applicant's civil partner; (iii) the applicant's fiancé or proposed civil partner; or (iv) a person who has been living together with the applicant in a relationship akin to marriage or civil partnership for at least two years prior to the date of application, unless the context otherwise requires.

22. As of the date of the hearing in the First-tier Tribunal, the relationship between the claimant and Mr Dixon had not progressed to one of a spouse or fiancé. One of the reasons for this is referred to earlier in this determination. In addition, Mr Dixon explained to me that he did not want their marriage to be perceived as being one of convenience. However, now that he realised that he would be treated as a partner under Appendix FM if he became formally engaged to the claimant, he was ready to take that step.

23. I also asked Mr Dixon about his financial circumstances. He said he owned the house where they lived. He had cash savings in a building society of £100,000, and he was the beneficiary of three private pensions which yielded a total of about £30,000 per annum. He had no dependants, apart from the claimant, as all his children were grown up and were independent.

24. On behalf of the Secretary of State, Mr Kandola does not dispute the finding of the First-tier Tribunal Judge that the claimant and Mr Dixon are living together in a relationship akin to marriage; that they intend to get married in the near future; and that they intend to live permanently with each other as husband and wife. But, as he also submits, I must assess the Article 8 claim as at the date of the hearing. The

relationship between the claimant and Mr Dixon does not give rise to a viable claim under Appendix FM.

25. Applying **Gulshan**, it is only if there may be arguably good grounds for granting leave to remain outside the Rules that it is necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. I find there are not arguably good grounds for granting leave to remain outside the Rules, as the claimant has the clear option of making an application for leave to remain *within the Rules*. She does not face a removal decision, as the Section 47 decision has been withdrawn. Moreover, she will not fall into the category of an overstayer until 28 days have elapsed from the date when her appeal rights are deemed to be exhausted. So provided the in-country application is made with reasonable expedition, the claimant will not need to go back to Zambia to apply for entry clearance as Mr Dixon's fiancée.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against the refusal by the Secretary of State to vary her leave to remain is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson