Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38311/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 November 2014	**On 16 December 2014**

Before

THE HONORABLE LORD BURNS AND
DESIGNATED JUDGE MURRAY

Between

MOLLY MANKHAMBA PHIRI

Appellant

and

THESECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Whitwell, Home Office Presenting Officer
For the Respondent: Mr Akomolade, Nathan Aaron Solicitors, London

DETERMINATION AND REASONS

1. The Appellant is a citizen of Malawi, born on 10 April 1986. She appealed against the decision of the Respondent dated 4 September 2013, refusing to grant her settlement in the United Kingdom under paragraph 276B of the Immigration Rules, on the basis that she has accrued ten years lawful residence in the United Kingdom. The Appeal was heard by Judge of the First Tier Tribunal Shamash and dismissed under the Immigration Rules, under Article 8 of ECHR and on Section 47 of the Immigration, Asylum and

Nationality Act 2006, in a determination promulgated on 11 September 2014.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First Tier Tribunal White on 22 October 2014. The grounds claim that discretion should have been exercised differently but they do not identify any discretion afforded to the Respondent the exercise of which is amenable to appeal before this Tribunal. The grounds state that the Judge set out a discursive exposition on the law and it is difficult to discern what approach the Judge has actually adopted to the question of human rights. The Judge's statement at paragraph 40, that the Appellant does not meet the terms of paragraph 276ADE of Appendix FM, which requires an Appellant to be living in the United Kingdom for 20 years, is arguably an incorrect statement of law which might have materially tainted his consideration of the issue of human rights.

The Hearing

3. The Appellant's representative submitted that there is an error of law at paragraph 40 of the determination as the Judge failed to properly consider Article 8. He submitted that the Respondent should have used discretion when making her decision. The Appellant came to the United Kingdom in 2004 and became pregnant in 2005. He submitted that because of this she forgot to renew her leave for a short period of time but after she had her baby she asked for her leave to be continued and at that point, after the Respondent saw her medical report, discretion was used and her leave was renewed.

4. He submitted that the Appellant applied for settlement on the basis that she had accrued ten years lawful residence in the United Kingdom but at the date of application and the date of the decision she had not been in the United Kingdom for ten years lawfully. He submitted that at the date of the Hearing she had been in the United Kingdom lawfully for more than ten years and because of this discretion should have been used by the Judge.

5. He referred us to the case of *FD (EEA) [2007] UK AIT 00049*. He submitted that when the Appellant overstayed in 2005 the Respondent showed discretion by granting her an extension in her leave and because of this the Judge should have used discretion when considering the ten year period. He submitted that the Appellant's child is now in Malawi.

6. The date of the decision is the relevant date.

7. We referred to paragraph 42 of the determination in which the Judge carefully considers the ten year point but finds that because of the five months the Appellant was not legally in the United Kingdom, the application does not meet the terms of the Rules.

8. We also asked the representative if the Appellant has always been in the United Kingdom as a student and he said she was a student until 2012 and then was granted leave as a post study worker. He referred us to the appellant's immigration history at paragraphs 5 to 10 of the determination. This states that from 2011 until 2013 the Appellant was a post study work migrant.

9. The Presenting Officer submitted that the grounds of application are only a disagreement with the outcome of the Appeal. He submitted that the said case of *FD* is a case under the EEA Regulations as amended and is therefore not an authority for this Appeal.

10. He referred us to paragraph 40 of the determination submitting that there is an error in this paragraph but that it is only a slip by the Judge. Instead of saying paragraph 276ADE he should have referred to paragraph 276 of HC395.

11. The Presenting Officer referred to paragraph 42 of the determination and the freestanding Article 8 claim. He referred to proportionality and submitted that the Appellant has factors in her favour, in that she can speak English and has been in the United Kingdom for over nine years. He submitted that the Judge weighed against that the fact that there are no compelling circumstances and that ten years is not determinative. He submitted that there are no cultural reasons why this Appellant should remain in the United Kingdom and if she is returned to Malawi this will not result in a breach of the United Kingdom's obligations under ECHR. He submitted that the Judge has taken into account the Appellant's private life in the United Kingdom. We were referred to page 29 of the Appellant's bundle and the chronology. He submitted that the appellant studied and attained a BA in Business Studies and then obtained post study work. He submitted that she has achieved what she came to the United Kingdom for but she is now saying she should get discretionary leave to remain because of her work and her studies. He submitted that there is nothing in the determination to suggest that the Judge erred in his proportionality assessment.

12. At paragraph 42 the Judge took into account the Appellant's difficulties in 2005. These difficulties were because of her pregnancy. He submitted that because of the pregnancy the Appellant is looking for discretion. He submitted that at paragraph 38 of the determination this issue is dealt with properly by the Judge. In this paragraph the Judge asks himself whether pregnancy is of itself an exceptional circumstance and refers to the fact that there was no medical evidence relating to complications in the pregnancy so no evidence was available for consideration. He found that an application for indefinite leave to remain, where the Appellant is relying on a period of time when she no longer had leave, is in his view insufficient and that pregnancy alone would not be sufficient to justify departing from the Rules.

13. The Presenting Officer referred to paragraph 42 and the fact that the Home Office accepted an application from the Appellant out of time and used her discretion but he submitted that that discretion is not relevant in this Appeal.

14. He submitted that the findings made by the Judge were open to him and there is no error of law in the determination but purely a disagreement with the decision. We were asked to dismiss the Appeal.

15. The Appellant's representative submitted that the Appellant came to the United Kingdom to study and was in a position to make further applications. She obtained leave to complete her degree and he submitted that if she had been here for ten years she would have been in a position to apply for settlement. He submitted that the documentary evidence shows that the Appellant got entry to the United Kingdom in 2004 and remained in the United Kingdom legally, apart from five months when the Home Office applied their discretion. He submitted that the Judge found that she had told the truth and that the Judge could have used his discretion and granted this Appeal. He submitted that the judge did not consider Article 8 of ECHR properly and in paragraph 42 of the determination it is clear that all the factors have not been taken into account. He submitted that as the Home Office found it right to use discretion in 2006, the Tribunal should now use discretion to allow the Appeal in spite of the five month period when the Appellant was not legally in the United Kingdom.

Determination

16. This Appellant's application does not meet the terms of the Immigration Rules. The relevant date is the date of the decision and at the date of the decision the Appellant had not been in the United Kingdom for ten years. She had only been in the United Kingdom for nine years and seven months. She was not legally in the United Kingdom for five months between 2005 and 2006. Discretion was used by the Respondent at that time and she was granted further leave to study. The decision today is a different matter entirely.

17. With regard to the error at paragraph 40 we find that this is a slip by the Judge and it does not require further consideration.

18. We find that the Judge was correct to find that pregnancy is not an exceptional circumstance. It is clear that this Appellant has not established ten years lawful residence and there are no exceptional circumstances in her application.

19. The Appellant has private life in the United Kingdom but when considering this we have also to consider paragraph 117B of the National Immigration & Asylum Act NIAA and the legitimate aim of immigration control which is in the public interest. The Appellant came to the United Kingdom to study and has now got a Bachelors Degree so the reason she came to the United

Kingdom has now been satisfied. We find that the Judge was fully entitled not to exercise discretion in the Appellant's favour. He has explained at paragraph 42 why he has not done this. For discretion to be exercised there would have to be compelling reasons for Article 8 to be considered outside the Rules. As explained in paragraph 42 that is not the case here. There is no reason why she should not return to Malawi as her family life, her child and her closest ties are there.

20. We find that the Judge's decision is correct and the appellant's application cannot meet the terms of the Rules and cannot be allowed under Article 8 of ECHR. It would not be disproportionate for her to return to Malawi.

Decision

21. There is no material error of law in the Judge's determination.

22. The determination of Judge Shamash promulgated on 11 September 2014 must stand.

Signed Date **16 December 2014**

Designated Judge Murray
Judge of the Upper Tribunal