UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/45177/2013**

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 18 September 2014	**On: 15 October 2014**
Prepared: 6 October 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MS ANGELA PAMHAI WAKATAMA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Billie, solicitor (IEI Solicitors)
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Zimbabwe, born on 2nd April 1971. She appealed the decision of the respondent dated 7th October 2013, refusing her application for leave to remain in the UK and to give directions for removal from the UK.

2. She arrived as a visitor to the UK on 31st December 2000. Her visa expired on 1st July 2001. On 4th July 2001, she applied for limited leave to remain as a student which was refused with no right of appeal on 13th February 2002. She then applied on 21st September 2012 for indefinite

leave to remain outside the rules, relying on private life, and in particular upon the fact that she was diagnosed as HIV positive at the Luton and Dunstable Hospital in 2005 and is receiving medical treatment in the UK.

3. She claimed that she has no family members and no home to return to in Zimbabwe.

4. In a decision promulgated on 11th July 2014, First-tier Tribunal Judge Beg dismissed "the human rights appeal" (articles 3 and 8). In dismissing the appeal, it was noted that the respondent concluded that the appellant had not reached the high threshold of Article 3 required in decisions such as **N v SSHD**.

5. Further, in relation to Article 8, she noted that the respondent had regard to Appendix FM and paragraph 276ADE of the rules in respect of her private life. She was 42 years old, having entered the UK on 31st December 2000. She had not lived in the UK continuously for at least 20 years. The respondent also contended that even though she had not lived in Zimbabwe for over 12 years, nonetheless she has social, cultural and family ties in Zimbabwe. She could continue her relationships in the UK from Zimbabwe.

6. The grounds of appeal before the First-tier Tribunal Judge contended that the decision was not compatible with her Article 3 and 8 rights. Further, she met the requirements of paragraph 276ADE.

7. The Judge found [9] that the appellant made an application for indefinite leave to remain outside the rules on 21st September 2012. At that date, she had been an overstayer for a significant number of years. Her credibility was significantly damaged by the fact that she made no application to regularise her stay after 2012 until the present application was made.

8. The Judge found that she relied on Articles 3 and 8 of the Human Rights Convention. The threshold in respect of Article 3 is high. She had regard to **N [2005] UKHL 31** as well as **D v UK**. In **N**, Lord Hope acknowledged that medical facilities in Uganda were not as well developed as those in the UK. A comparison between the health benefits and other forms of assistance which are available in the expelling state with those in the receiving country does not in itself give rise to an entitlement to remain in the territory of the expelling state.

9. The Judge found [14] that although the appellant was diagnosed in the UK as HIV positive, it is likely that she had also been tested for HIV in Zimbabwe, bearing in mind that her husband died of the same condition before she came here. Her representative had in fact submitted that her husband died of the same illness in Zimbabwe.

10. The Judge found that even if she accepted that the appellant's parents were deceased, she is an adult who was working in Zimbabwe as a school secretary before she came to the UK. Her brother now lives in Tanzania. The appellant claimed that there were no surviving aunts and uncles. However, in 2000, she came on a visit visa to visit her cousin who lives in London and is a priest. He was her sponsor. She sees him once a month. Her cousin has a brother in Zimbabwe whom he visits from time to time.

11. The Judge found [15] that even if the appellant is not close to her cousin's brother in Zimbabwe, nonetheless there will be someone in Zimbabwe from whom the appellant could seek advice and moral support to help her re-establish herself there.

12. The Judge also had regard to the number of her close church friends. The appellant had had a history of working in Zimbabwe. There was however no credible evidence that she would not be able to seek employment there with which she is familiar. She would be able to attend another church and establish herself in another community. She would be able to keep in contact with friends in the UK.

13. The Judge noted that the “thrust” of her case is that she would not be able to access medical treatment in Zimbabwe and would not have the support of the friends that she currently has. There was significant evidence that anti-retroviral treatment is available in Zimbabwe. The Judge had regard to the COI reports in respect of Zimbabwe that HIV/AIDS treatment is available there.

14. She took into account the objective evidence submitted on the appellant's behalf. The report from the newspaper of September 2013 referred to the acute shortages of the anti-retroviral drugs at public health institutions which was seriously compromising the health of more than half a million people living with HIV and AIDS. Since the introduction of a new regime, tenofovir, there has been a decline in the supply of drugs at all public health institutions, resulting in patients being given one week supplies or the old drugs with more serious side effects.

15. The Judge found that many of the articles, some of which are old and go back to 2008 and 2010, indicate that there have been shortages in Zimbabwe of anti-retroviral drugs. However the test is not the quality of healthcare in the UK as compared to Zimbabwe. She found that drugs are available, even if not immediately free at the point of access. The appellant would be able to rely on the support of friends in the UK to help her access such drugs immediately on return.

16. The appellant's circumstances are not exceptional. Her condition is stable. The circumstances do not compare to **D v UK**.

17. The Judge noted that she did not have a partner or family life in the UK. In considering the evidence in its totality, she did not find that the appellant had reached the high threshold of Article 3. Nor would she be destitute on return to Zimbabwe.

18. She found that the appellant has a private life in the UK. She took into account the appellant's immigration history and the length of time she has lived here. She has been able to access a significant amount of expensive medical treatment here. The Judge found that "she could reasonably be expected to return to Zimbabwe and re-establish her life there." [20]. She referred to **RS (Zimbabwe – AIDS) Zimbabwe CG [2010] UKUT 363** where the Court held that a significant number of people are receiving treatment for HIV/AIDS in Zimbabwe and hence a Zimbabwean returnee would not succeed in a claim for international protection on the basis of HIV/AIDS unless their case crosses the threshold identified in **N v UK**.

19. Nor would her return to Zimbabwe place the UK in breach of its obligations under the Disability Discrimination Act.

20. The Judge took into account **DM (Zambia) V SSHD [2009] EWCA Civ 474** where Lord Justice Sedley held that to remove an AIDS sufferer from free care and treatment in one of the best health services in the world, which had rescued her from what would otherwise have been a terminal condition, would seem to have been a clear interference with her physical and psychological integrity and thus an invasion of her private life.

21. Judge Beg found that there is no doubt that removing the appellant from the UK would interfere with her private life, that is, her psychological and her physical condition. Nevertheless, the issue for the Judge that she was required to consider is "one of proportionality." She concluded that the interference would not be disproportionate in all the circumstances.

22. Accordingly, she found that even a minimal disruption of her anti-retroviral treatment while she is returned to Zimbabwe would not lead to the conclusion that interference in her Article 8 rights would be in a manner sufficiently serious so as to amount to a breach of the fundamental right protected by Article 8.

23. On 29th July 2014, Designated First-tier Tribunal Judge McCarthy granted the appellant permission to appeal to the Upper Tribunal. He noted that the grounds averred that although the Judge made findings relating to Articles 3 and 8 of the Human Rights Convention, she failed to determine the appeal on the grounds that the immigration decision was not in accordance with the immigration rules. Further, it was also argued that the Judge's approach to Article 8 was not adequate.

24. Judge McCarthy states that in paragraphs 5 and 6 of the determination, Judge Beg recognised that paragraph 276ADE was in issue but at no point thereafter engaged with those provisions. Although the Judge made some findings [15] and [16] that relate to her continued ties to Zimbabwe, it was not clear whether those were sufficient considerations of the issues arising under paragraph 276ADE. Therefore, the appellant had identified an arguable legal error and permission to appeal was granted.

25. He went on to state that if the appellant were to succeed under paragraph 276ADE, then the proportionality exercise may have to be revisited. Accordingly, although not granting permission to appeal on that basis, he "left it open."

26. Mr Billie submitted that there was no proper indication that the Judge reached a finding of fact as to whether the appellant had ties to Zimbabwe or not. That omission is particularly apparent in paragraph 21, where the Judge made no reference to the claim under paragraph 276ADE. The Judge had accordingly failed to give reasons, or adequate reasons, on a material matter which amounts to a material error of law.

27. He also submitted that even if the Judge is found to have considered the claim under paragraph 276ADE, the accepted evidence does not support any conclusion that she has any ties, including social, cultural or family, to Zimbabwe.

28. This is because the test under paragraph 276ADE is more than assessing the extent of the family and friends that the person has in the country to which she is being deported or removed, but also includes a consideration of "the quality of the relationships that person has with those friends and family members" - **Ogundimu (Article 8 – New Rules) Nigeria [2013] UKUT 00060 (IAC)**.

29. He submitted that the word "ties" involved more than a continued connection to life in Zimbabwe i.e., something that ties a claimant to Zimbabwe. If that were not the case, it would appear that a person's nationality of the country of proposed deportation could have itself led to a failure to meet the requirements of the rule. That would render the application of the rule, given the context within which it operates, entirely meaningless.

30. He submitted that from **Ogundimu**, consideration of whether a person has "no ties" to such a country must involve a rounded assessment of all the relevant circumstances and is not limited to "social, cultural and family circumstances." In that case, the Court was satisfied that the appellant had no ties with Nigeria, being a stranger to the country. His father may have ties but there are none for the appellant. It is

noteworthy that the appellant had been resident in the UK as a child and all his ties are with the UK. He consequently had so little connection with Nigeria as to mean that the consequences for his establishing private life there at the age of 28, after 22 years' residence here, would be "unjustifiably harsh."

31. Mr Billie nevertheless submitted that in this case, any suggestion that the appellant has ties to Zimbabwe because she has a cousin who is in the UK who in turn has a brother in Zimbabwe, who has never been close to the appellant, and who resides far from the appellant's city of return, is not in accordance with the law, having regard to the authority cited, because it does not take into account the extent and quality of the relationship between the parties.

32. Further, Mr Billie also submitted that the Judge failed to assess Article 8 in accordance with the law. Having accepted that the appellant has private life and that removing her from the UK would interfere with her private life, that is her psychological and her physical condition, the Judge concluded that her return would be proportionate.

33. There was however no indication that the Judge properly addressed the relevant stages of the five steps in the manner mandated by Lord Bingham in the case of **Razgar**. That is important because once a claimant has established that she enjoys a protected right which is threatened with violation, the burden shifts to the state to prove that the violation is justified.

34. Here, there is no indication whether Article 8 is engaged or not, or whether any removal is in accordance with the law or necessary in the public interest. Without identifying such legitimate aims when considering interference with the appellant's private life, the Judge could not properly strike a fair balance between the respective interests.

35. The Judge finally failed to assess fairly the evidence adduced relating to the availability of treatment in Zimbabwe. The Judge rejected the background evidence on the grounds that some of it was old and dated as far as 2008 and 2010. Nevertheless the Judge accepted various reports cited in the COI dated as far back as 2010, 2011 and 2012.

36. On behalf of the respondent, Mr Bramble submitted that although her determination contained no reference to paragraph 276ADE in the findings, Judge Beg's findings themselves at paragraph 15 and 16 indicated that she 'would have concluded' that the requirements of that paragraph could not be satisfied on the basis that the appellant had retained social, cultural and family ties with Zimbabwe.

37. Although Mr Bramble accepted that the Judge did not properly address paragraph 276ADE, he nevertheless submitted that it was immaterial. He referred to **Ogundimu**, supra, and emphasised that in that case, the appellant was aged 6 when he arrived in the UK. This was also a deportation case. Since his arrival in the UK, the appellant had only visited Nigeria on one occasion. It was to attend a wedding.

38. At paragraph 123, in that case, the Judge referred to the natural and ordinary meaning of the word "ties" which imports the concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties the claimant to his or her country of origin.

39. He then referred to paragraph 124, where a rounded assessment of all the relevant circumstances must be taken, which is not to be limited to social, cultural and family circumstances. Mr Bramble submitted that on the facts of **Ogundimu**, it was clearly evident that the appellant had been in the UK for 22 years and was only 28 at the date of the hearing. In those circumstances, the consequences for returning him to Nigeria would be "unjustifiably harsh, given that he had so little connection with Nigeria." Regard must be had to the individual facts in that decision.

40. In contrast, the appellant here does still have ties to Zimbabwe. He referred to paragraph 15 and 16 relating to the cousin as well as potential friends in a church.

41. He submitted that there was sufficient consideration given to these matters, irrespective of whether paragraph 276ADE was expressly considered.

42. In any event, he submitted that the relevant components in paragraph 276ADE have ultimately been considered. She has had contact with Zimbabwe and has various support networks. The Judge had regard to the evidence given by the appellant as set out at paragraph 7 of the determination. She would be able to attend church in Zimbabwe, depending on how she is feeling.

43. She had worked as a school secretary in her home town before she came here. She lives close to Harare. She has only one sibling and that is her brother, who lives in Tanzania. He left Zimbabwe in 2005. Her father died in 2011. Her uncle is also deceased. Her father had no sisters. Her mother died in 2004. Both her brothers are deceased. She has no sisters. Her brother works for a motoring company and she speaks to him about three times a month.

44. At paragraph 8, it was also established that she had no relatives in Zimbabwe. She is not close to her cousin in the UK or his brother.

45. At paragraph 21, Mr Bramble submitted that the Judge "brought it all together" in considering the return to Zimbabwe of a person diagnosed with HIV/AIDS. Proper regard was had to **DM (Zambia)**, supra.

46. Although the Judge did not 'properly' consider the steps from **Razgar** to be undertaken in such a case, he nevertheless had proper regard to the circumstances as a whole.

47. In reply, Mr Billie stressed the evidence relating to the appellant's position. She has no parents. Her brother and his children are in Tanzania. She is a widow. As to her ties, she only has a cousin in the UK to whom she is not close. There is in fact nobody close at all in Zimbabwe. It is clear that **Ogundimu** was not properly applied.

48. If paragraph 276 had properly been applied, it is reasonably likely that a court would conclude that she does not have the relevant ties and consequently would be entitled to succeed under the rules.

Assessment

49. It is evident that the First-tier Tribunal Judge made a significant number of findings and considered evidence relating in particular to Article 3. She also considered Article 8, albeit very briefly.

50. I agree with Designated First-tier Tribunal Judge McCarthy's reasons for granting permission. Although Judge Beg recognised that paragraph 276ADE was in issue, she did not thereafter engage with those provisions. Although, as relied on by Mr Bramble, there were some findings made by the Judge at paragraphs 15 and 16 regarding her continued ties to Zimbabwe, there was no consideration given to the proper approach regarding the meaning of the words "no ties (social, cultural or family)" similarly contained in paragraph 399A of the Immigration Rules.

51. Paragraph 276ADE sets out the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK. The applicant must show that she is 18 years or above, has lived continuously in the UK for less than 20 years, but has no ties (including social, cultural or family) with the country to which she would have to go if required to leave the UK.

52. The Tribunal in **Ogundimu** took note of the fact that the use of the phrase in paragraph 399A of the Rules is not exclusive to that rule but is also used in paragraph 276ADE, in the context of the requirements to be

met by an applicant for leave to remain based on private life, where she has lived here for less than 20 years.

53. Although the Judge has considered the relationships, such as they are, that the appellant has in the UK and Zimbabwe, she has nevertheless not considered them with regard to the proper approach identified in **Ogundimu**.

54. I accordingly find that the decision of the Tribunal was not in accordance with the law. Both parties agreed that if I came to that conclusion, that the decision of the First-tier Tribunal would have to be set aside and a fresh decision made.

55. Mr Billie submitted that this was an appropriate case for the appeal to be remitted to the First-tier Tribunal. Mr Bramble did not oppose that submission, stating that he would remain neutral.

56. I have considered the Senior President's guidance in that respect. I find that the appellant has not had the benefit of a proper consideration of her appeal under paragraph 276ADE of the Immigration Rules. She has thus been deprived of the opportunity of having her case properly considered. There will also be fairly extensive fact finding required.

57. I find in the circumstances that this is a proper case for the appeal to be remitted to the First-tier Tribunal.

Decisions

The decision of the First-tier Tribunal involved the making of a material error of law. The decision is accordingly set aside.

It is directed that the appellant's appeal be remitted for a rehearing to Taylor House (not before First-tier Tribunal Judge Beg).

The necessary administrative arrangements will have to be completed having regard to the availability of the parties.

No anonymity direction made.

Signed Date 6/10/2014

C R Mailer
Deputy Upper Tribunal Judge