



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01883/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 26th January 2015

Determination Promulgated
On 30th January 2015

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS TARIRO SENZEN MELE
(Anonymity Direction Not Made)

Respondent

Representation:

For the Appellant: Mr g Harrison (Senior Home Office Presenting Officer)

For the Respondent: Mr A Lee (Medivas)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Respondent, with permission, against the determination of First-tier Tribunal Judge Raikes promulgated on 9th September 2014 by which she allowed the Appellant's appeal against the Secretary of State's decision to refuse her leave to remain in the UK on the basis of her private and family life and to remove her to Zimbabwe.

2. For the purposes of continuity I shall refer in this determination to the Secretary of State as the Respondent and Miss Mele as the Appellant.
3. The Secretary of State's grounds argue that the Judge misdirected herself in relation to her approach to Article 8 and whether or not she should have considered Article 8 outside the Immigration Rules. The grounds point out that at paragraph 36 of the determination the Judge stated that she was not satisfied that the Appellant's circumstances justified an exercise of discretion to grant leave on compassionate grounds. It is then argued that having so found the Judge should not have considered Article 8 outside the Rules. The facts were the same and her finding meant that there was nothing about her case which was of a compelling or exceptional nature to warrant a grant outside the Rules. The grounds also argue that the Judge did not deal properly with or make findings as to why she found there to be family life between this Appellant, who is an adult, and her family members.
4. The facts of this case are that the Appellant entered the UK in December 2006 as a work permit dependent. She was granted subsequent extensions of leave, latterly as a dependent child over the age of 18, valid until October 2013. She made an in time application for leave to remain under appendix FM. That application was refused by the Secretary of State on 12th December 2013 on the basis she did not meet the requirements under paragraph 276 ADE and could not succeed under Appendix FM.
5. It is clear, as stated in the determination and in the letter of refusal, that the Appellant applied for leave to remain under Appendix FM when she could not meet the requirements as she was over the age of 18 and not dependent upon her parents. The only issue under the Rules therefore was paragraph 276 ADE.
6. The Appellant argued in her notice of appeal that she had established family and private life in the UK and ought to succeed on that basis.
7. The Appellant's case was that she had come to the UK with her brother to join her family in 2006 and thus has lived in the UK from the age of 17 ½ to the present day, which by the date of the First-tier Tribunal's consideration was seven years and eight months. She has visited Zimbabwe only once in that time, to attend her sisters wedding. in Zimbabwe she lodged with her family in a house because her father was living in accommodation provided by his work which only has one bedroom. Her father, who remains in Zimbabwe, visits the family in the UK often but apart from him she has no close ties to Zimbabwe. Her two best friends from Zimbabwe also now live in the UK.
8. Since she has been in the UK the Appellant has attended school and further education and is now employed on a full-time basis. She has made lifelong friends in the community in the UK and is fully integrated into the community in Nottingham.
9. Her father left the UK in 2010 in order to work in Zimbabwe and since that time she has assisted her mother with the bills by part-time work and now full time work. She has also assisted her mother with her brother's upbringing.

10. Her case is that if returned to Zimbabwe she would have nowhere to live and while her father is there, his accommodation is not suitable for her and once his current employment contract ceases it is his intention to apply to come to the UK to join his family. She left Zimbabwe at the age of 17 and is now aged 28. Additionally she has been in a relationship in the UK for some five years and 11 months and she and her partner, although they do not live together, have made plans for the future together.
11. The Judge's findings of fact on the evidence start at paragraph 31 of her determination. She found the Appellant and those who gave evidence on her behalf to be honest and credible witnesses and she noted that the Appellant had at all times been in the UK lawfully. She said she was satisfied that the Appellant has a close and loving family in the UK and that her mother and brother have been granted indefinite leave to remain. She accepted that the Appellant, having obtained various qualifications, was now living and working in the UK and she also accepted that she is in a long-term relationship with her partner and although his immigration status is of a temporary nature, they hope to build their future together.
12. The Judge then at paragraph 34 found that the Appellant has family in Zimbabwe and that her claim as contained within her statement that she would have nowhere to go and no one to live with was overstated. She found that albeit contact was sporadic she had extended family members in Zimbabwe as well as her father, although he had stated an intention to seek leave to enter the UK in the future. She also noted the evidence regarding the inadequacy of the father's accommodation in Zimbabwe but also that there was no documentary evidence to support the fact that she could not live with him. She did however accept the oral evidence that there would be difficulties in the father accommodating his daughter.
13. At paragraph 36 the Judge considered paragraph 276 ADE of the Rules. She noted the Appellant had been in the UK since 2006 and her mother and only brother and other family members are here with leave to remain. However she had not lived in the UK continuously for 20 years and she was not satisfied that the Appellant had no ties to Zimbabwe. She concluded that paragraph by saying:-

"I am not satisfied her circumstances were she to return to Zimbabwe would have justified an exercise of discretion or grant of leave on compassionate grounds. I am not satisfied therefore that the Appellant has met the Immigration Rules as stated."
14. At paragraph 37 the judge notes that the Appellant does not fall within any of the exceptions under the Rules.
15. The Judge then goes on, without explanation, to consider Article 8 outside the Rules. She does not explain what in the factual matrix of this case justified a consideration outside the Rules and what was in the factual matrix which was not dealt with under the Rules. Arguably there was nothing.

16. In the Judge's consideration of Article 8, which is lengthy and detailed, she finds family life to exist between the Appellant and her family in the UK but does not explain why this is given that there is no dependency over the normal emotional ties of an adult with her wider family (Kugathas [2003] EWCA Civ 31). This is not a case of a young adult who has just turned 18. She is 25 and in full time employment and considering a life away from the family with her partner. Additionally, her younger brother with whom she claims a quasi parental responsibility is now some 16 years of age and on his own evidence is fairly independent. Indeed he remained in the UK when the family travelled to Zimbabwe for the sisters wedding.
17. At paragraph 46 of the determination the Judge noted the requirement to consider section 117, inserted into the Nationality, Immigration and Asylum Act 2002 by section 19 of the Immigration Act 2014. She found that the Appellant speaks English and has at no time been in the UK unlawfully nor has her status ever been precarious. She said that she had found that the Appellant had a significant private life, including her work, friends and partner and a meaningful and close family relationship with her mother, brother and other family. She concluded that paragraph by saying that she found that the Appellant's removal would be justifiably harsh and therefore disproportionate.
18. In defence of the determination Mr Lee provided a skeleton argument which he expanded before me. He argued that the Judge had taken everything fully into account and given all matters full consideration. He argued that the judge was entitled to consider Article 8 outside the Rules and pointed out that the Appellant lived with her mother and brother and there had been only one visit to Zimbabwe since her arrival in 2006. There had not been frequent contact with family there and she had been fully educated and was now working in the UK. Additionally she has a partner with whom she has a genuine and subsisting relationship. Her ties to Zimbabwe, he argued, are weak.
19. He pointed out that the Judge set out the Razgar [2004] UKHL 27 principles and dealt with those on a step-by-step basis.
20. With regard to the question of family life as an adult, he argued that the Judge clearly indicated that she found the Appellant to be in a close and loving relationship with her family and in terms of Kugathas and Nasim (Article 8) [2014] UKUT 00025 (IAC) the judge had found the ties to her mother and brother were particularly strong and that she had spent her entire adult life in the UK. She has no friends in Zimbabwe; all her ties are to the UK. He argued that the Judge was entitled to find compelling circumstances and insurmountable obstacles why she could not return to Zimbabwe.
21. I find that the Judge in this case has made a material error of law such that the determination must be set aside.
22. The judge has made completely contradictory findings in terms of her consideration of paragraph 276 ADE and Article 8. She correctly concluded that the Appellant

could not succeed under Appendix FM as she is now an adult who is working and who has no dependents. The Judge then considered paragraph 276 ADE and taking all of the evidence into account found that the Appellant could not succeed on that basis. If the Appellant could not succeed under paragraph 276 ADE, the Judge finding there to be no compassionate reasons to allow the appeal, it is then wholly contradictory to go on and consider that she should succeed on Article 8 grounds outside the Rules.

23. The Judge should have concluded the determination at paragraph 37. Her error was to consider and allow the appeal under the ECHR on exactly the same facts that led her to dismiss it under the Rules.
24. There is nothing unusual about this case to justify a consideration under the ECHR. Additionally, the Judge erred in her consideration of section 117 as she appears to have proceeded on the basis that where an Appellant speaks English and has been here lawfully that is a point in her favour whereas in fact it simply means that those points do not count against her.
25. As the Judge approached Article 8 on a wholly erroneous basis the determination must be set aside in its entirety.
26. As matters will have inevitably moved on since the original decision and the First-tier Tribunal's consideration it will be necessary to hear evidence and for that reason I remit the appeal for a full rehearing before the First-tier Tribunal.
27. The appeal to the Upper Tribunal is allowed.
28. Having remitted the appeal to the First-tier Tribunal it should be listed for hearing at Stoke hearing centre.

Signed

Dated 27th January 2015

Upper Tribunal Judge Martin