Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09876/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th January 2015	**On 19th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR KEITH MUSEKIWA MAKONI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss P Makunzva (Solicitor)
For the Respondent: Mr E Tufan (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Herbert OBE, promulgated on 8th October 2014, following a hearing at Taylor House on 29th September 2014. In the determination, the judge allowed the appeal of Keith Musekiwa Makoni. The Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Zimbabwe, who was born on 9th February 1978. He appealed against the decision of the Respondent Secretary of State dated 21st January 2014 rejecting the Appellant's application to remain in the UK on the basis of ten years' continuous residence because he could not comply with paragraph

276ADE, and it was also not accepted that the Appellant had a partner or a child in the UK who met the requirements of the Immigration Rules.

The Judge's Findings

3. The judge observed how the Appellant had come to the UK on 11th September 2002, as a 24 year old man, and was granted leave to remain until 11th September 2003. His leave was extended until 29th November 2007. Further applications were rejected between 30th November 2007 and 8th February 2008. These applications were in relation to his student stays. The Appellant maintained that he had at all material times applied on time but the Respondent had lost the postal orders enclosed with his application and he had faced great difficulty in obtaining his Zimbabwean passport and had eventually been forced to send his passbook back to Zimbabwe with his parents in order for a new one to be safely issued which only occurred approximately one year later. There was a period of some 134 days between the expiry of the Appellant's leave on 30th November 2007 and the grant of his leave to remain as a student on 7th April 2008, which was largely caused by issues relating to fees and passport, such that he could not fall under the twelve year concession of the Immigration Rules.

4. The judge also had regard to the fact that the Appellant had attended university in the UK and had subsequently obtained "significant employment as a quantity surveyor in London with a reputable company" (paragraph 24). He had gone on to establish "a long term and serious relationship with his partner who is a UK citizen with whom he has been living since December 2013". The Appellant's "partner also gave evidence before me who is a UK citizen originating from Ghana..." (paragraph 25). The Appellant's partner was "a senior project information manager with a firm called AECOM who earns some £39,000 per annum" (paragraph 26). The judge was firm in his conclusion that, "it is clear from the couple's answers, a party who intend to get married in the foreseeable future and who are in a very deep and committed relationship" (paragraph 27).

5. The judge then went on to consider the application of the law and held that the Appellant "is not eligible under the Immigration Rules for the ten years' long residence as it is not continuous..." (paragraph 30). The judge applied then the two stage approach in the case of **Gulshan** (see paragraph 31) before moving on to consideration of the **Razgar** principles (paragraph 32). In that context, the judge considered the current codification of the **Razgar** principles in Section 117 of the Immigration Act 2014 (paragraph 33). The judge held that the Appellant was a person of previous good character, was a tax payer, and was in a durable relationship "which will almost certainly lead to their marriage" (paragraph 37).

6. In applying the **Razgar** principles, the judge held that there would be "grave consequences if he were now to be removed because his partner would not re-establish herself in Zimbabwe as she has no knowledge of the language, culture or economic ability to re-establish herself there save for a relationship with the Appellant" (paragraph 38). The judge's conclusions were that "the removal of this Appellant would cause significant hardship to both the Appellant and his civil partner" (paragraph 40).

7. The appeal is allowed.

Grounds of Application

8. The grounds of application state that the judge had not sufficiently identified what were the "compelling reasons" as required by **Nagre** and **Gulshan**, such that the judge could go outside the Immigration Rules and consider freestanding Article 8 jurisprudence.

9. On 24th November 2014, permission to appeal was granted.

Submissions

10. At the hearing before me on 13th January 2015, Mr Tufan, appearing on behalf of the Appellant, relied upon the Grounds of Appeal. He submitted first, that it was clear that the Appellant could not satisfy the Immigration Rules; but that second, the judge allowed the appeal on the same facts under Article 8, without explaining why he could do so. This was important because there was nothing in the facts that could be considered to be exceptional. Mr Tufan relied upon the recent case of **Nasim [2014] UKUT 25**. It is true that there had been a relationship with a partner since 2013 but no evidence that such a relationship would fit into Appendix FM paragraph 276ADE.

11. For her part, Miss Makunzva submitted that first, there was evidence in the bundle that the Appellant's partner was born in the UK, had been living here all her life, and could not go and live in Zimbabwe, because she was a person of Ghanaian extraction. Her name is Sharon Osei.

12. Second, she gave evidence about her relationship, was cross-examined before the judge, and the judge concluded that theirs was a genuine relationship which was "very deep and committed" (paragraph 27). The judge was clear that this relationship "will almost certainly lead to their marriage" (paragraph 37). The reason why they have not married is because the passport of the Appellant remains with the Respondent Secretary of State, without which she cannot go into a registry office and get married.

13. Third, the judge did consider the two stage test in **Gulshan** (see paragraphs 30 to 31), before proceeding on to the **Razgar** principles (at paragraph 32) and then considering Section 117 (at paragraph 33) of the 2014 Act. Most importantly, the judge actually identified the "exceptional circumstances" at paragraph 38 of the determination when he said that there would be "grave consequences if he were allowed to be removed because his partner could not re-establish herself in Zimbabwe as she has no knowledge of the language..." (paragraph 38). The judge concluded that removal "would cause significant hardship to both the Appellant and his civil partner" (paragraph 40).

14. Finally, a spate of recent cases such as **Oludoyi [2014] UKUT 539**, now confirmed that there was no "intermediary test", such that the Appellant would have succeeded under the current approaches to Article 8 issues. In fact, the Appellant would have succeeded under Section 117B because he was in a genuine and subsisting

relationship with a qualifying partner which had not been established at a time when he was in the UK unlawfully. His private life had not been developed in circumstances where his status was precarious.

15. In reply, Mr Tufan relied upon paragraph 23 of **Oludoyi**, where the Tribunal makes it clear that it is not always necessary to follow the five step approach explained in **Razgar** because it is only if the circumstances relied upon for the grant of leave outside the Immigration Rules relate to matters that go to proportionality, that it is permissible to proceed to the question of proportionality.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) TCEA 2007) for the following reasons.

17. First and foremost, this was a case where the Appellant could not succeed under the Immigration Rules, and the judge so found, because he did not have a seamless whole of ten years' long residence (see paragraph 30). There had been a break in the continuity. The judge was clear that, "some of this delay may have been due to the Respondent themselves" (paragraph 30).

18. Second, in considering the Appellant's relationship with Sharon Osei, a person who has no association with Zimbabwe, the judge was looking at the situation which did not represent a "complete code" as far as the Immigration Rules were concerned. The application was on the basis of the so called ten year Rule. Paragraph 276ADE is also not a complete code.

19. Third, and no less importantly, this is a case where, in the light of what has been established by **Oludoyi** in the Upper Tribunal in 2014, it must be recognised that there is no "intermediary test" before freestanding Article 8 jurisprudence can be considered, such that the approach of the judge was flawed, even on the basis of the arguments put forward by the Respondent Secretary of State.

20. This is a case where the Appellant would have succeeded under Section 117B of the 2014 Act. There is, accordingly, no error of law in the determination. The determination, in terms of its analysis and findings, as described above, was comprehensive and thorough.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 15th January 2015