



**First-tier Tribunal
Asylum and Immigration Tribunal**

Appeal Number: IA/45177/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 6 November 2015**

**Determination Promulgated
On 14 December 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

**MR A.P. WAKATAMA
(Anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Mr W.M. Bebe, Solicitor

For the respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Zimbabwe born on 2 April 1971 appealed to the First-tier Tribunal against the decision of the respondent dated 7 October 2013 to refuse her application for leave to remain in the United Kingdom pursuant to paragraph 276ADE of the Immigration Rules and to give directions for her removal from the United Kingdom.
2. The appellant appealed against the respondent's decision dated 11 October 2013 and First-tier Tribunal Judge Beg dismissed the appellant's appeal on Article 3 and 8 of the European Convention on Human Rights and with reference to the Immigration Rules, in a determination dated 11

July 2014. Permission to appeal that decision was granted by designated First-tier Tribunal Judge McCarthy on 29 July 2014 and it came before Deputy Upper Tribunal Judge Mailer. He found that the decision of the First-tier Tribunal involved the making of a material error of law and the decision of Judge Beg was set aside.

3. The appeal was then heard by First-tier Tribunal Judge Davey who dismissed the appellant's appeal in the determination dated 26 January 2015. Permission to appeal against that decision was granted by First-tier Tribunal Judge Shimmin on 14 September 2015 stating that there is a failure to properly consider paragraph 276ADE and whether the appellant no longer has ties with her country of origin and by failing to consider all five questions raised in **Razgar**.
4. Thus the appeal came before me.

Issues in the appeal

5. Two Judges dismissed the appellant's appeal both under paragraph 276 ADE and Article 8 of the European Convention on Human Rights. The issues in this appeal which fell for determination in respect of paragraph 276 ADE was whether the appellant had lost ties with her country of origin, Zimbabwe. The relevant paragraph 276 ADE requirements, at the date of the decision of First-tier Tribunal Judge beg were as follows "That the applicant is aged 18 years or above, has lived continuously in the United Kingdom for less than 20 years... but has no ties (including social, cultural family) with the country to which he would have to go if required to leave the United Kingdom". In respect of Article 8 whether all five questions raised in **Razgar** have been answered

The First-tier Tribunal judge's findings

6. The Judge found that on a fair reading of the Deputy Upper Tribunal Judge's decision, he finds that the First-tier Tribunal Judge made no error of law in the findings of fact and in the assessment of her Article 3 claim. There was no obvious error in law in relation to the Article 8 claim, save insofar as, if the appellant did not meet paragraph 276 ADE of the Immigration Rules and to the extent that bears on the question of Article 8 consideration outside the Immigration Rules in terms of proportionality.
7. The Judge made the following findings which I summarise. The evidence filed on behalf of the appellant addressing this issue of ties to her home country, is extremely limited. Plainly a significant portion of the evidence is addressing the appellant's health conditions in that she is HIV positive with its attendant physical consequences, for example opportunistic infections. The appellant's evidence relates somewhat historically, to matters in being at or about July 2013 and there was no updating of the medical evidence but four short paragraphs about her need for help from others. There is no current medical evidence of the appellant's treatment, testing, antiretroviral medication, prognosis, risk from any interruption in

HIV treatment or its availability or lack thereof or consequences to her on return for her health or life expectancy. The appellant said that her parents and husband in Zimbabwe are deceased and she does not have anyone in Zimbabwe to support her on a day-to-day basis or help her to look after herself. The appellant made enquiries on the Internet about the availability of treatment and found some people could get treatment whilst others could not.

8. The Judge accepted the findings of first-tier Tribunal Judge Beg and stated that in the circumstances the lack of up-to-date medical evidence, the lack of evidence of support by HGPC church members, the lack of any assessment by social services, the lack of evidence that the appellant has lost social/cultural ties goes to show that there will be significant interference by her removal in respect of her private life, and in light of her immigration conduct, health and the public interest, was not proportionate of the objectives of Article 2 (2) of the EEC HR. The judge dismissed the appellant's appeal on Article 8 grounds and under the Immigration Rules.

Grounds of appeal

9. The appellant in her grounds of appeal states the following which I summarise. It was common ground that the appellant's parents and husband are deceased. It was also accepted that the appellant's only sibling (brother) and his children are now residing in Tanzania. It is common ground that the appellant left Zimbabwe about 15 years ago. The issue therefore was whether the circumstances sufficient to meet the requirements of paragraph 276 ADE of the Immigration Rules. In paragraph 14 of the determination, Judge Davey accepted that the appellant has lost her "social connections with friends and acquaintances as well as changes to her family and that is one of the aspects of connection with Zimbabwe that she no longer has
10. These findings alone are sufficient to meet the requirements under paragraph 276 ADE of the Immigration Rules. Clearly the Judge accepted that the appellant no longer has any social or family ties to Zimbabwe.
11. In paragraph 15 of the determination the Judge fell into error when she decided that apart from the loss of social or family ties the appellant is required to demonstrate loss of additional ties to Zimbabwe, such as linguistic and cultural ties. Paragraph 276 ADE of the Immigration Rules do not require the claimant to demonstrate loss of all formal ties to their country. The word "or" in the phrase "including social, cultural or family" serves to link the alternative ties each of which can stand alone, and satisfy the requirements in paragraph 276 ADE.
12. The Judge's interpretation in the case of **Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 00060 (IAC)**, in which that court explained at paragraph 123 is that a person's nationality does not lead to a failure to meet the requirements under the Immigration Rules as "this would render

the application of the rule, given the context within which it operates, entirely meaningless.

13. The appellant's assessment of the Article 8 claim is fundamentally flawed and hence an error of law. At Paragraph 20 and 21 the Judge accepted that the appellant has private life in the United Kingdom and that there was "no doubt that removing the appellant from the United Kingdom would interfere with her private life that in her psychological and physical condition". There is no indication that the Judge addressed the second, third and fourth stages in the sequential manner posed by Lord Bingham in the case of **Razgar**.
14. The procedure of addressing only the first and fifth stages of the case formula has been held to be an error of law. The case of **WK (Article 8 - expulsion cases - review of case law) Palestinian Territories [2006] UKUT 00070** where it was stated that in many cases errors of law occur because judicial fact-finding miss out the second of Lord Bingham's five questions. Having found that a person enjoys private or family life in the United Kingdom and move straight to Lord Bingham's first question, yet in many cases and particularly with private life alone is at issue, the second question, if properly addressed, will result in a negative answer. The Judge did not indicate whether Article 8 is engaged, and if not, why it is not engaged. The Judge's failure to address Article 8 in accordance with the formalistic precedents made his assessment not clear. The approach taken by the European Court establishes that Article 8 is to be analysed according to a step-by-step approach, asking first whether there is an existing private or family life, second whether there is an interference with that private or family life, third whether that interference pursues a legitimate aim, fourth whether it is in accordance with the law and finally whether it is proportionate.
15. The judge in **Miao [2006] EWCA Civ 75** in this case identified no reasons of interfering with a protected right under Article 8. Once in appellant has established that he enjoys a protected right which is threatened with violation, the burden shifts to the state to prove that the violation is nevertheless justified.
16. At the hearing I heard submissions from both parties.

Findings as to whether there is a material error of law in the determination.

17. Upper Tribunal Judge found an error of law in the First-tier Tribunal Judge's decision and send it back to be reheard. It was heard again by First-tier Tribunal Judge Davey who dismissed the appellant's appeal.
18. The Upper Tribunal Judge took into account that Deputy Upper Tribunal Judge Mailer found that the appellant had not had a proper consideration of the appeal under paragraph 276ADE of the Immigration Rules and an error of law had arisen which meant that the original Tribunal decision did

not stand on that issue and would have to be remade. Deputy Upper Tribunal Judge found that there was no error of law in the findings of fact and in the assessment of Article 8 claim under the European Convention on Human Rights. He also found there was no obvious error of law in relation to the Article 8 claim, save insofar as, if the appellant did not meet the paragraph 276 ADE of the Immigration Rules, that bore on the question of Article 8 considerations outside the Immigration Rules in terms of proportionality.

19. The Judge found that the evidence on behalf of the appellant is extremely limited and most of the evidence is about the appellant's health condition in that she is HIV positive with its attendant physical consequences and opportunistic infections. The Judge took into account that the appellant did not provide an up-to-date medical report to know what her current condition is and that the last medical report was in 2013.
20. The Judge stated whilst it appears that the appellant has lost some social connections with friends and acquaintances as well as changes to her family that is one of the aspects of connections in Zimbabwe that she no longer has. The Judge went on however to find that the appellant spent her whole youth and majority of her adult life in Zimbabwe. He did not find that the appellant had lost linguistic and cultural ties with her own country. The Judge then found that the appellant gave no indication that life has changed to the extent that she now feels culturally alienated with Zimbabwe or linguistically so.
21. The Judge also found that the appellant has not demonstrated that she has lost her ties with Zimbabwe and therefore she does not succeed under paragraph 276 ADE of the Immigration Rules.
22. The Judge also adopted the findings made by Judge Beg and stated that given the lack of up to date medical evidence, the lack of evidence of support by HTPC church members, the lack of any assessment by social services, the lack of evidence that the appellant has lost social/cultural ties.
23. It is clear from that stated above that further evidence is required in order to make a fair assessment of the appellant's claim under paragraph 276 ADE and Article 8 of the European Convention on Human Rights.
24. I therefore direct that the appeal be placed before the First-tier Tribunal, other than Judge Beg and Judge Davey, for fact-finding as to whether the appellant meets the requirements of paragraph 276 ADE and Article 8 of the European Convention on Human Rights.

Conclusions

DECISION

The appeal be sent back to the First-tier Tribunal.

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana

Dated this 2nd day of December 2015