Upper Tribunal
(Immigration and Asylum Chamber) **Appeal No: IA/45430/2013**

THE IMMIGRATION ACTS

Heard at Field House
Decision promulgated
On 11 December 2014 **On 6 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DIGNEY

Between

SHERON NYASHA MUGABE (MS)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the respondent: Ms Pal, Home Office Presenting Officer

DECISION AND REASONS

1. On 24 January 2013 the appellant who was born in 1987, a citizen of Zimbabwe, applied for leave to remain as the child of a person present and settled in this country who was over 18 but had been granted leave under paragraph 302 of the Immigration Rules. That application was refused under paragraph 276 ADE of the rules on 16 October 2013. It is to be noted that it appears that at the time of the application the appellant had been in this country lawfully for nine years and seven

months but at the time of the decision had been here lawfully for over ten years.[1]

2. An appeal against the decision was dismissed after a hearing on 2 September 2014. The judge concluded, as had the respondent, that the appellant could not meet the requirements of paragraph 276 ADE.

3. Permission to appeal was sought and granted. In granting permission the judge said, after stating why the appeal had been dismissed:

> My concern is that it appears from the appellant's immigration history that she may qualify for leave under paragraph 276B of the Immigration Rules.[2] She has been in the UK for over ten years and it appears on the face of it that she may have had lawful leave throughout that time. Judge Khan appears to have given no consideration to the length of time she has been in the UK. The appellant was not legally represented.

4. The facts on which permission was granted appear to be correct. The respondent says that I should conclude that there has been no material error of law for two reasons. The first is to be found in paragraph 3 of the rule 24 response. That states:

> As regards the grounds related to the failure of the Judge to consider paragraph 276B of the Immigration Rules, the appellant is free to make an appropriate application in this regard for the respondent to consider with the appropriate supporting evidence and it is submitted that the failure of the Judge to consider this is not a material error of law.

5. The fact that a fresh application could be made is irrelevant as to whether a decision contains a material error of law. If a point should have been considered and was not that is likely to amount to a material error of law.

6. The second point was raised by the presenting officer at this hearing. She argued that the judge did not need to consider paragraph 276B as it was not raised before him. As the judge points out at paragraph 18 of his determination, the "[n]otice of appeal is expressed in general terms". It was drafted by the appellant and reference is not made to any particular paragraphs of the Immigration Rules. However the grounds make it clear that, if the facts alleged are correct, paragraph 276B would be engaged and the judge actually states, in paragraph 27 of his determination that the appellant has been in this country for 11 years. In those circumstances it was incumbent on the judge to consider paragraph 276B and his failure to do so amounts to a material error of law.

7. It follows that I conclude that the decision is vitiated by a material error of law and the parties are agreed that in those circumstances, as the

[1] This fact seems to be acknowledged in the paragraph on page 3 of the RFRL that starts "Furthermore, whilst"
[2] Ten years' lawful residence.

matter has never been considered, the appropriate course is that the matter is remitted to the First-tier Tribunal at Hatton Cross for the matter to be considered afresh by any judge other than Judge Khan. As the rule 24 response states, “appropriate supporting evidence” will have to be provided.

8. It follows that the original determination did contain an error of law and the appeal is accordingly allowed to the extent set out above.

The appeal is accordingly allowed

Deputy Upper Tribunal Judge Digney 5 January 2015