Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03133/2018**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 4 April 2019	**On: 16 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS BETTY MPINYURI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Ms K Pal, Senior Home Office Presenting Officer
For the Respondent: Ms J Bond, counsel, instructed by Irving & Co Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant. The claimant is a national of Zimbabwe, born on 28 November 1953.

2. The secretary of state appeals with permission against the decision of the First-tier Tribunal Judge, promulgated on 30 November 2018, allowing her appeal under Article 8 of the Human Rights Convention.

3. The chronology presented to the First-tier Tribunal noted that the claimant entered on 27 August 1999. The Judge stated that she came to the UK in August 1999 [1]. However, Ms Bond, who represented the claimant before the First-tier Tribunal, informed me that it is now asserted that the claimant entered the UK as a visitor on 27 February 1999.

4. Judge Rai noted that the claimant has two sons and a daughter living in the UK along with other extended family members including grandchildren. She also has a son who remains in Zimbabwe.

5. She stated that the claimant's Immigration history "is chequered" and is not disputed. She made several applications for leave to remain as a student which were rejected or which were invalid over the years. Two of her applications were granted. She also made an asylum application in March 2009 which was refused in September 2009. Two applications for leave to remain as a student were granted, namely in August 2013 until 31 October 2005 and a further application made on 25 October 2005 was granted until 31 January 2007.

6. She applied on 15 March 2016 for leave to remain in the UK on the basis of her private life. This was considered as further submissions and not a fresh claim. Her application was refused with no right of appeal. Judicial proceedings followed and a consent order was sealed on 5 October 2017 and the secretary of state undertook to reconsider her application. The claimant's application was refused on 11 January 2018 which was the decision before the Tribunal.

7. In her Decision and Reasons, Judge Rai stated that the main issue is whether the claimant met the "very high threshold test" of very significant obstacles if she was required to return to Zimbabwe. She considered this in the context of her age, health, family connections to Zimbabwe and the like. She is 64 years old and was in her mid 40s when she left Zimbabwe and had spent much of her life there. If returned she would have to seek out rented accommodation and may not as easily be able to find employment.

8. She had acquired a diploma which would provide her with skills and qualifications to her benefit [23]. In any event she would have the continued support of her family in the UK who could support her financially. She does not have any medical issues which would prevent her return.

9. Having considered all those factors, she found that there are no significant obstacles to her return. She accepted that there would be hardship and inconvenience which may prove to be an unsettling period for her but this did not mean that she met the test for very significant obstacles. She thus did not meet the Rules [23].

10. She considered Article 8 outside the Rules. The appellant had been in the UK for sixteen and a half years at the date of application and for over 19 years at the date of hearing. This fell short of the recognised period of 20 years under the Rules. She made friends, has two sons and a daughter, a sister, grandson and extended family members here. Her daughter is a British citizen and her sons have indefinite leave to remain. She found that private life has been engaged given the long period that she has remained here [25].

11. She considered whether her return would be unjustifiably harsh such that it would be disproportionate [26]. She noted that the Rules are there to maintain effective immigration control which the claimant circumvented by remaining in the UK following the expiry of her visa in 1999. Although

there were periods of leave thereafter, had her career in the NHS as a nurse been as important as she claimed, she would have returned to Zimbabwe and applied under the correct Rules.

12. She balanced that against the significant ties she has built up in the last 19 years and the consequence of expecting her to return to Zimbabwe with no home or employment. Her ties to Zimbabwe will have reduced significantly, and she accepted that her life is now in the UK. She found that on return she would be without family or other support. That would result in unjustifiably harsh consequences for the claimant such that it would be a disproportionate interference with her private life to remove her [28].

13. She had earlier noted at [11] that the assessment of whether any interference is justified under Article 8 (2), the public interest “factors” set out in s.117B must be taken into account when considering the public interest. At [29] she noted that there was no issue taken with the claimant's ability to speak English. She was not in receipt of benefits but was supported by her family and was not a burden on the taxpayer. She stated that once the claimant's immigration status has been resolved, she will be entitled to work and contribute as a taxpayer [29].

14. She allowed the claimant's appeal “with reference to Article 8 ECHR”.

15. The secretary of state contended in the grounds seeking permission to appeal that the claimant entered the UK in August 1999 on a visit visa but overstayed until August 2003 when she was granted leave to remain as a student until January 2007. Since then she remained unlawfully in the UK.

16. It was noted that the Judge considered her claim outside the Rules, finding that the decision to remove her would be disproportionately interfering with her private life after such a long period in the UK.

17. It was contended that the Judge fell into material error by failing to “invoke the mandatory public interest requirements under s.117B”. In particular, she failed to take into account the fact that the appellant's residence has always been unlawful or precarious. Accordingly, the Judge failed to give the claimant's private life “little weight” as is required under s.117B(4) and the proportionality assessment is flawed.

18. On 31 December 2018, First-tier Tribunal Judge Parkes granted the secretary of state permission to appeal, albeit that he stated at paragraph 5 of his decision that the grounds disclosed ‘no arguable error of law’ and permission to appeal is granted. Under the “slip rule”, Resident Judge Zucker amended paragraph 5 to read “the grounds are arguable and permission to appeal is granted.”

19. Ms Pal on behalf of the secretary of state referred to [23] of the decision. The Judge found that the claimant did not succeed under paragraph 276ADE(1)(vi) of the Rules. She found that she would have the continued support of her family in the UK who could financially support her. She did not have any medical issues. Although there would be hardship and inconvenience which might be unsettling for a period, this did not meet the test of very significant obstacles.

20. When considering the claim outside the Rules she considered the proportionality of the decision, finding that the claimant would, on return, be without family or other support. That would amount to unjustifiably harsh consequences for the claimant amounting to a disproportionate interference with her private life [28].

21. Ms Pal submitted that the finding at [28] was clearly inconsistent with her earlier finding at [23] that there would not be very significant obstacles to the claimant's integration for the purpose of paragraph 276ADE(1)(vi) as she would have the continued support of her family in the UK who could financially support her. She had also acquired qualifications and skills in the UK which would be to her benefit.

22. Ms Pal submitted that the Judge also failed to make any findings under s.117B(4) of the 2002 Act. Whilst she took into account some of the s.117B considerations, she did not consider claimant's largely precarious status and did not give only "little weight" as required under the section. For a very substantial period, the claimant remained without leave. A proper assessment was moreover important as the claimant had worked as a nurse when she did not have any leave to remain here.

23. There has accordingly been a material error and the decision should be set aside and remitted to the First-tier Tribunal for a proper assessment to be made.

24. On behalf of the claimant, Ms Bond referred to her skeleton argument produced to the First-tier Tribunal. She stated that she had recently received instructions that the claimant had in fact entered the UK on 27 February 1999. It was not correct as asserted in the chronology before the First-tier Tribunal that she arrived only on 27 August 1999.

25. In refusing her asylum claim it was noted by the secretary of state that she claimed to have entered the UK in February 1999. That however was not a matter that was made known to the First-tier Tribunal Judge. The secretary of state accepted that even if she had arrived in February 1999, the claimant had still not resided in the UK for a period of 20 years under the Rule. There must have been 20 years that she had lived here from the date of application. Nevertheless, the Judge noted that she was running up against the 20 year period under the Rules.

26. She submitted that contention regarding the "inconsistent findings" did not form part of the grounds of appeal. In any event, the Judge has undertaken a s.117B assessment. It must accordingly be assumed that the Judge was aware of the need to assess 'the public interest question' having referred to section 117B at [11]. She has properly considered it. This was referred to in the skeleton argument produced before her. There was also reference to the decision of the Court of Appeal in Ruhppiah. On the facts of the appeal, it was open to Judge Rai to make that finding.

27. Even if there was not a dependency in the Kugathas sense, there was a sufficiently lengthy private life. No material error was made. In the event that an error is found, further fact finding is necessary and the decision should be remitted for a fresh hearing.

28. In reply, Ms Pal denied that she had not sought to raise a new ground. She noted that the Judge found at [23], that the claimant was unable to

meet the relevant requirements under paragraph 276ADE of the Rules. The grounds seeking permission referred to [28] where the secretary of state's decision was found to be disproportionate on the basis that the claimant had been in the UK for 19 years and would be without support. The fact that she had been here unlawfully outside the Rules was not factored in which is a serious omission in the light her finding at [23] and the contradictory finding at [28].

Assessment

29. I find that there has been a material error of law in the making of the decision.

30. The First-tier Tribunal Judge found that there would not be very significant obstacles to the claimant's re-integration into Zimbabwe. In particular, even if she were unable to secure employment, she would have the continued support of her family in the UK who could financially support her.

31. However, when assessing the proportionality of the decision under Article 8, she found that on her return to Zimbabwe, the claimant would be without family or other support. There was no explanation why this would result in unjustifiably harsh consequences for her in the light of her earlier finding that there would be not be very significant obstacles to her return.

32. As noted by First-tier Tribunal Judge Parkes, her evidence did not show that she could not return to Zimbabwe and the findings of the Judge did not address what significant difficulties she would face, given her skills and family there. The Judge may have identified reasons why the claimant might not have wanted to return and might find some challenges, but that was not the test.

33. Further, although she did refer to s.117B of the 2002 Act, she did not consider that the claimant's presence in the UK had been unlawful for a considerable period and therefore attracted little weight. The failure to consider a mandatory requirement under s.117B is an error of law.

34. In the circumstances, I set aside the decision. The parties agreed that in those circumstances, the appeal should be remitted to the First-tier Tribunal for a fresh decision to be made.

35. Further fact finding is necessary. This includes a consideration of when the claimant first entered the UK. Although she claimed in her witness statement before the First-tier Tribunal that she arrived in the UK on 27 February 1999, the Judge stated that she came to the UK in August 1999. There was no clear evidence that she had in fact entered the UK on 27 February 1999. It is said to be supported on the secretary of state's decision refusing her earlier asylum claim. The asylum decision was not produced. That date is also at variance with the chronology presented to the First-tier Tribunal,

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law.

The decision is set aside and is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made by another Judge.

Anonymity direction not made.

Signed Date 12 April 2019

Deputy Upper Tribunal Judge Mailer