



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: VA/02610/2013

**THE IMMIGRATION ACTS**

**Heard at Birmingham, Sheldon Court**

**On 19<sup>th</sup> September 2014**

**Determination**

**Promulgated**

**On 26<sup>th</sup> September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MRS SHUVAYI GWAGA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER, PRETORIA**

Respondent

**Representation:**

For the Appellant: Mr K Nwaiwu (Solicitor)

For the Respondent: Mr Richards (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Borsada promulgated on 1<sup>st</sup> May 2014, following a hearing at Birmingham, Sheldon Court on 22<sup>nd</sup> April 2014. In the determination, the judge

dismissed the appeal of Shuvayi Gwafa. The Appellant 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 female, she is a citizen of Zimbabwe. She was born on 26<sup>th</sup> January 1947. She appeals against the decision of the Entry Clearance Officer in Pretoria rejecting her application for a visit visa to come to the UK to see her family (the Sponsor daughter and her son), dated 28<sup>th</sup> November 2012. The applicable Immigration Rules are paragraphs 41 and 320(7A) of HC 395.

### **The Appellant's Claim**

3. The Appellant's claim is that she had come to the UK many times and returned back to South Africa without ever infringing the Immigration Rules. She has a stable financial situation. She has good family reasons for returning. In the application for a visit visa she had failed to mention a previous application for leave to remain in the UK which was rejected. This was a mistake.

### **The Judge's Findings**

4. The judge, who heard submissions from the Appellant's sponsoring daughter, Jessica Gwafa, determined that he was satisfied

"That the witnesses could be regarded as truthful in that they gave clear and consistent evidence that contained no discrepancies and they were prepared to accept errors that were made in the process of drafting the application which was also to their credit" (paragraph 7).

5. The judge also observed that the Appellant herself had a "good track record which is to be commended" (paragraph 8). However, there had been failure to mention an application in 2009/2010. The judge observed that,

"The Sponsor has conceded that a mistake was made and there was a failure to mention this. I am satisfied that this was a material fact and that it was not disclosed. I am not satisfied that there was a false representation and instead I accept that it was a simple mistake and nothing more" (paragraph 10).

6. The judge, nevertheless, held that the mandatory requirement of the Immigration Rules, even if there was an honest mistake, was that an application in these circumstances should be dismissed.

### **Grounds of Application**

7. The grounds of application state that, given that judge had found that there was no dishonesty or deception involved, the appeal should have

been allowed on the basis that this was simply a mistake and nothing more.

8. On 25<sup>th</sup> June 2014, permission to appeal was granted.
9. On 2<sup>nd</sup> July 2014, a Rule 24 response was entered.

### **Submissions**

10. At the hearing before me on 19<sup>th</sup> September 2014, Mr Nwaiwu, representing the Appellant, relied upon the Grounds of Appeal.
11. For his part, Mr Richard stated that, even if the judge had erred in holding that a simple mistake would lead to a mandatory refusal, the question was where this led us. He submitted that there were still no findings in relation to the Appellant's intentions. Given that this was the case, if I were to set aside the decision of the judge, I should remit it back to the First-tier Tribunal so that proper findings can be made by a First-tier Tribunal Judge about the Appellant's true intentions.
12. In reply, Mr Nwaiwu submitted that this was not a case where under practice statement 7.1 and 7.3, the matter should be remitted back to the First-tier Tribunal. This is because adequate findings of fact had been made. With respect to the Appellant's true intentions, it was clear, as the judge found, that the evidence was that,

“The Sponsor confirmed that the Appellant had returned to Zimbabwe voluntarily in 2010 because her son had died leaving two orphaned children (the children's mother had also died). Those children were still under the age of 18 and the Appellant was responsible for looking after them such that she could not stay away from Zimbabwe for very long” (see paragraph 5(iii)).

In the circumstances, there existed evidence before this Tribunal to enable it to remake the decision.

### **Error of Law and Remaking the Decision**

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). As the judge granting permission observed, the Court of Appeal has established in **AA (Nigeria) [2010] EWCA Civ 773** that “dishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a false representation a ground for mandatory refusal” (see paragraph 76).
14. This means that given that the judge had held that this was a case of “a simple mistake and nothing more” the judge was not entitled, by virtue of that fact alone, to dismiss the appeal. I accordingly set aside the decision.

15. In remaking the decision, I have had regard to the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the simple reason that there was evidence before the judge going to the Appellant's intentions.
16. At paragraph 5(iii) the judge heard evidence that the Appellant would have to return to the two orphaned children of her son who were under the age of 18, and for whom she had responsibility, and the judge accepted this evidence before him.
17. Given that the evidence has been accepted, and given that the Appellant has hitherto had a good immigration track record, I find that the requirements of paragraph 41 of HC 395 are satisfied.
18. The Appellant will note that this appeal is being allowed specifically in recognition of the fact that she has maintained a very good immigration track record.
19. Should that record be jeopardised in future by either her actions or the actions of others it will imperil all future applications that she is likely to make.

### **Decision**

20. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.
21. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

26<sup>th</sup> September 2014