



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

Appeal Number: IA/27755/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 11 February 2015**

**Decision & Reasons Promulgated
On 25 February 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GESIYA CHIYANGWA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. The respondent, Gesiya Chiyangwa, was born on 29 December 1959 and is a citizen of Zimbabwe. I shall hereafter refer to the respondent as the appellant and to the appellant as the respondent (as they appeared respectively before the First-tier Tribunal).
2. The appellant had appealed against the decision of the respondent dated 17 June 2014 to refuse her leave to remain in the United Kingdom on human rights grounds in a decision of the same date under Section 10 of the Immigration and Asylum Act 1999 for her removal to Zimbabwe. The

First-tier Tribunal (Judge Birkby) in a determination dated 29 September 2014, allowed the appeal on human rights grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The grounds of appeal complain that the judge failed to have regard to relevant jurisprudence in allowing the appeal, in particular *Nagre* [2013] EWHC 720 (Admin) and *Nasim* [2014] UKUT 00025 (IAC).
4. The judge found that the appellant was not at real risk of ill-treatment in Zimbabwe but did conclude that her removal to that country would be disproportionate and allowed the appeal on Article 8 ECHR grounds. I do not agree with the judge who granted permission in this case that the judge's findings are incomplete or inadequate. The judge made detailed findings and, in my opinion, assessed the evidence very carefully as is evidenced in his determination at [59 - 64];

All in all, I found the Appellant to be a credible witness in what she stated. Her evidence was not exaggerated or embellished, save possibly with regard to what she said about the availability of drugs in Zimbabwe. The Appellant readily conceded matters that were put to her by Mr Archibald. She accepted that she had remained in the UK illegally. She accepted that on one occasion she has used fraud in order to remain in the United Kingdom. I find as proved on the balance of probability the facts as stated to me by the Appellant. I believe that she has looked after her daughter and sons when she has been in the United Kingdom, although it was stated by the Respondent that the daughter's leave to remain in the United Kingdom was based to an extent on the assertion that the daughter at the time lived with her father and not the Appellant. The Appellant currently lives with one son and his wife and two children. I am satisfied that the sons provide for the Appellant's financial and accommodation needs and I also find that her emotional needs are inextricably linked to her children and grandchildren in the United Kingdom. She has no children in Zimbabwe although she has siblings and her parents. She has been in the United Kingdom now for in the order of fourteen years. Her life in my judgment in the United Kingdom has been a life with her children, and in particular her daughter. She is quite proud of her daughter who is now at university in Leeds. I accept that contact between Deirdre and the Appellant is frequent and is regularly maintained. If the Appellant were to return to Zimbabwe she would lose the majority of the current direct contact that she has with all her children. All her children are in my judgment emotionally to a great extent dependent on the Appellant as is the Appellant emotionally dependent on them.

I have carefully considered the Appellant's appeal with regard to Article 8 of the Human Rights Convention, and in particular Section 117B of the Immigration Act 2014 concerning public interest considerations. It is clear that the maintenance of an effective immigration control is in the public interest. It is furthermore in the public interest and in particular the interests of the economic wellbeing of the United Kingdom that persons such as the Appellant are able to speak English, which the Appellant does. Section 117B(3) requires me to take into account that persons who seek to enter or remain in the United Kingdom are financially independent because they are not a burden on tax payers and are better able to integrate into society. With regard to the Appellant before me she is to an extent a

burden to the tax payers in that she avails herself of medical treatment in the United Kingdom and if she were to stay in the United Kingdom would I believe find it difficult obtaining sufficient work to finance herself, although I do find that she is a determined woman and would certainly make every effort to find employment to finance herself. I also believe that her children would support her financially in the United Kingdom so that she would not have to rely on state financial benefits. Section 117B(4) requires me to give little weight to the Appellant's private life which the Appellant has established when in the United Kingdom unlawfully and it is clear that the Appellant has been in the United Kingdom for most of the time in the UK unlawfully. I am required also under Section 117B(5) to give little weight to the Appellant's private life when her immigration status was precarious. Pursuant to Section 117B(6) I do not find that the Appellant has a genuine and subsisting relationship with a qualifying child, as none of her children are under the age of 18. She also has no partner in the United Kingdom.

Looking at the totality and considering the evidence cumulatively, I have concluded that the Appellant's situation is exceptional, compelling and compassionate. I have considered the dicta in the case of **Gulshan** and am satisfied that it is appropriate that I consider the Appellant's appeal in the light of Article 8 generally and in the light of the dicta in the case of **Razgar**.

I am satisfied that Article 8 of the Human Rights Convention is engaged in the Appellant's case. The Appellant has enjoyed a private and family life in the United Kingdom for fourteen years and has brought up children in the United Kingdom. Her children are still in the United Kingdom. Her grandchildren are in the United Kingdom. They all have leave to remain in the United Kingdom. They all intend to remain in the United Kingdom. The Appellant has enjoyed a private life in the United Kingdom although her private life and indeed her family life has been enjoyed whilst the Appellant did not have leave to remain in the United Kingdom. In my judgment the decisions of the Respondent interfere with the Appellant's right to respect for her private and family life. However, they are both lawful and pursue the legitimate aim of immigration control.

Nevertheless, I find that the decisions are not proportionate in all the circumstances. The balancing exercise requires careful consideration. The Appellant's medical conditions are serious although I am not satisfied that treatment would not be available in Zimbabwe. Nevertheless she is receiving hospital treatment in the United Kingdom and if she were to remain in the United Kingdom that would be an expense which would have to be borne by the tax payer. Whilst it is the case that the Appellant has lived illegally in the United Kingdom, that the Appellant arguably will not be able to support herself in the United Kingdom without either the help of her children, which I believe would be forthcoming, and that the Appellant has used deception in order to remain in the United Kingdom previously, in my judgment there are factors which outweigh such considerations and other considerations which do not favour the Appellant in the balancing exercise.. In essence they are as follows. The Appellant has lived in the United Kingdom for fourteen years. She has worked in the United Kingdom. She has been a mother in the United Kingdom. I believe that she is the one and not the father who brought up her daughter, Deirdre, prior to the time that Deirdre started university. Admittedly Deirdre is no longer a child and is over the age of 18. However, there is in my judgment clearly a strong bond

between the two and an emotional dependency between the two. The Appellant lives with her son and two grandchildren. If she were to return to Zimbabwe her contact with her daughter, sons and grandchildren would in essence be severely curtailed. Her sons are both in employment. Her daughter is going to university and I believe that it would not just have been her education but her upbringing by her mother which had led to her being able to go to university. All in all, I believe that the decisions of the Respondent are in this particular case not reasonable.

This appeal is therefore allowed pursuant to Article 8 of the European Convention on Human Rights and fundamental freedoms (the Human Rights Convention).

5. Mr Diwnycz, for the respondent, submitted that the judge had failed to have regard to the new statutory provisions concerning the application of Article 8 in particular, Section 117B(6). However, the judge does refer to that subsection at [60] (see above). I consider that Judge Birkby was very well aware that the circumstances of the appellant had to be exceptional for Article 8 to be engaged and the appeal allowed. He has given the “careful consideration” to his analysis which he stated he would give at [63]. It was open, on the particular facts, to the judge to identify certain aspects of the appellant’s circumstances as exceptional. Further, I do not find that it can be said that allowing this appeal on these facts was either unconscionable or perverse; it was an outcome which was available to the judge. The question, therefore, is whether the judge has justified the outcome by a proper analysis of the evidence and by sustainable reasoning. I find that he has done so. I consider that the Upper Tribunal should hesitate before interfering with the analysis of a judge who has had the opportunity of hearing oral evidence and who appears, in his written judgment, to have addressed not only those factors in favour of the appellant but also those factors favouring her removal. Another Tribunal may have reached a different outcome but that is not the point. In the circumstances, I dismiss the appeal.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed

Date 24 February 2015

Upper Tribunal Judge Clive Lane