



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

Appeal Number: IA/46902/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 January 2015**

**Determination  
Promulgated  
On 10 February 2015**

**Before**

**DESIGNATED JUDGE MURRAY**

**Between**

**AGNESS MWAMBA NUTANDE BWALE  
(ANONYMITY HAS NOT BEEN DIRECTED)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Hart, Terence Ray Solicitors, London

For the Respondent: Ms Vidyadharan, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a national of Zambia born on 29 December 1957. She appealed against the decision of the respondent dated 10 September 2013 refusing her application for leave to remain in the United Kingdom outside the Immigration Rules. Her claim is based on her private and family life in the United Kingdom, her health problems and her fear of ill-treatment in Zambia. She has not claimed asylum. Her appeal was heard by Judge of the First-tier Tribunal Clarke on 22 September 2014 and

dismissed under the Immigration Rules and on human rights grounds in a determination promulgated on 6 October 2014.

2. An application for permission to appeal was made on behalf of the appellant. Permission to appeal was granted by First-tier Tribunal Judge Shimmin. He found there to be an arguable error of law in the First-tier determination because the judge failed to deal with the appellant's Article 3 claim. The other grounds refer to the appellant's Article 8 claim. First-tier Tribunal Judge Shimmin found that these grounds are not strong and amount primarily to a disagreement with the findings but found that they remain open for argument.

## **The Hearing**

3. This is an error of law hearing on behalf of the appellant. Mr Hart, for the appellant, submitted that he does not agree with the permission to appeal relating to Article 8 and that he would be making submissions relating to Article 3 and Article 8.
4. The representative submitted that Article 3 has been largely ignored by the judge although Article 3 is referred to in the determination at paragraphs 3, 6 and 11. He submitted that at paragraph 11, although the judge refers to the ill-treatment meted out to the appellant by her husband's family in Zambia, she makes no findings on this. He submitted that the judge does not properly consider the appellant's physical and mental health, her fear of return to Zambia and the rights of her family in the United Kingdom. I was referred to the representative's skeleton argument at paragraph 16 dealing with Article 3 and the appellant's real risk on return to Zambia. Her physical and moral integrity is also referred to in this paragraph.
5. The representative referred to paragraph 8 of the grounds which refers to paragraph 23 of the determination. He submitted that the judge appears to have refused to deal with the substance of the Article 3 claim because the appellant did not explain how she is unable to relocate within Zambia.
6. I was referred to the refusal letter dated 10 September 2013 at paragraphs 18-23. This refers to Article 3. The representative submitted that the refusal letter is wrong when it states that the appellant returning to Zambia would not breach the United Kingdom's obligations under Articles 3 and 8 of ECHR on medical grounds. He referred me to the statement by Mary Mutande Mulrooney in which Ms Mulrooney refers to the torture the appellant went through in Zambia and he referred me to the statement of Sheila Ngosa which refers to the events which took place in Zambia when the appellant's husband died and how his family mistreated the appellant. Sheila Ngosa's statement refers to the appellant being beaten by her husband's family and death threats being made by them against her. I was then referred to Dr Elliot's statement and the drugs prescribed to the appellant, which she is still taking. These are for

depression and anxiety and he submitted that the judge was aware of this but did not give it weight in the determination.

7. The representative then went on to the Rule 24 response by the respondent and submitted that there is an error at paragraph 5 which states "Contrary to the grounds it does not appear that there was any attempt to address the necessary issues. The Presenting Officer's minute states "Overall much time spent on questioning appellant regarding her ties to Zambia and the situation with her brother-in-law threatening her not to speak to her son. In essence asylum was being raised but taken at its highest the appellant can internally relocate or seek state protection." He submitted that this is in effect an Article 3 point and this is something that was not considered by the judge.
8. The representative went on to Article 8 submitting that the grounds of application relating to Article 8 are not merely a disagreement with the judge's findings. He submitted that the judge failed to assess proportionality and made no mention of the case of Razgar [2004] UKHL 27. He submitted that at paragraph 27 of the determination the judge accepts that the appellant has a private life in the United Kingdom but the judge made no examination of the extent of that private life. He submitted that the judge was not right to state that the appellant has no family life in the United Kingdom and submitted that she should have assessed this along with private life. He submitted that the appellant has a place in the private lives of Mary Mulrooney and Sheila Ngosa and also with their 3 minor children. He submitted that the appellant's friends and their family members have had bad experiences in the last 3 years. Julie Bwalya's son Michael was murdered in 2010 in the United Kingdom and the appellant's friend Clare Tembo's husband was assassinated in Zambia in 2001. Clare has also had a stroke. He submitted that the appellant is instrumental in supporting these families. This is a special dependency. He submitted that had the judge looked properly at all the evidence she could have rejected these issues but she did not look at it and this is an error of law. He submitted that although the judge found that the evidence of Sheila Ngosa and Mary Mulrooney lacked credibility, there is no mention of the statements of Julie Bwalya and Clare Tembo being disbelieved.
9. The representative referred me to paragraph 28 of the determination which refers to the case of Edgehill and Another v SSHD [2014] EWCA Civ 402. He submitted that based on this case the judge finds that the appellant has no family life in the UK although she has private life here. He submitted that the judge does not properly consider the length of time this appellant has been in the United Kingdom and he referred to paragraph 10 of the determination in which the judge accepts that the appellant falls within the terms of paragraph 38 of Edgehill. He submitted that the judge at paragraph 28 has misapplied this case. He submitted that it was wrong to apply the new Rules when the old Rules were the relevant ones and the judge in her determination did not deal with the situation under the old Rules. He submitted that the judge was wrong to

find that the appellant is in the same position as the applicant HB, in Edgehill. He submitted that the judge has not assessed the Article 8 evidence before her satisfactorily and has not properly dealt with the compelling and exceptional circumstances in this appellant's private life. He submitted that if paragraph 276ADE of the new Rules cannot be satisfied, a free-standing Article 8 decision has to be made. This appellant is in a "grandmother" relationship with the minor children she stays with or has stayed with. This is supported by the witnesses and the best interests of these children have to be considered. He submitted that although the judge refers to these children at paragraph 26 of the determination, no proper assessment of their best interests has been made. He submitted that the judge should have considered the case of Beoku-Betts and the effect the removal of the appellant will have on the appellant's friends and their families, who, as a result of their relationship with the appellant are similar to family members. He submitted also that the judge has made no reference to the appellant's lack of criminality during her time in the United Kingdom.

10. He submitted that the appellant has conceded that the 14 year rule has not been satisfied but the judge should still have taken into account the length of time the appellant has been in the United Kingdom which is 13 years. He submitted that at paragraph 29 of the determination the judge refers to the witnesses and the appellant's family members wishing her to remain in the United Kingdom and goes on to say that taking the case at its highest, public interest in her removal outweighs their rights. He submitted that this is only an opinion and when the judge refers to section 117 of the Nationality, Immigration & Asylum Act 2002 she does not specify what part of this section she is dealing with.
11. I put to the representative that the judge is clearly referring to public interest at paragraph 30. She also refers to this at paragraph 29 and I pointed out that in the determination at paragraphs 12-22, the judge has given adequate reasons for coming to the conclusion she did about the credibility of the appellant and her witnesses. The representative submitted that the judge should have explained her credibility findings more clearly. I referred to paragraph 13 of the determination in which the judge points out that when the appellant was interviewed she answered questions in a way which is not supported by the evidence that is now being put forward. He submitted that the interview had nothing to do with this particular claim but I pointed out that the appellant answered factual questions where there could only be a right answer or a wrong answer and no explanation has been given for the discrepancies.
12. I was referred to the Home Office refusal letter at paragraphs 18-23 under the heading "Article 3" and the Home Office reference to the COI Report and the case of N v SSHD [2005] UKHL31. He submitted that the refusal letter refers to the health care in Zambia being of a lower standard than that in the United Kingdom but the judge has not considered this. He referred to the country guidance case of N which states that a person has to demonstrate that their condition will lead to their dying without medical

care or assistance from family and friends submitting that the case of N does not require to be considered.

13. The representative submitted that internal relocation has not been dealt with in the determination. The judge states that the appellant's family can support her in Zambia. He submitted that it would be difficult for her to relocate at age 57 after spending such a long period in the United Kingdom. He submitted that the appellant could not get work in Zambia and that the judge's references to these matters have not been properly thought through.
14. The representative submitted that there are errors of law in the judge's determination and I was asked to set the decision aside.
15. The Presenting Officer made her submissions submitting that with regard to the Article 8 issue the grounds of application are a clear example of mere disagreement with the judge's findings.
16. She submitted that the judge has balanced the evidence and given her opinion. She submitted that the judge was entitled to reach the decision she did relating to Article 8.
17. The Presenting Officer went on to refer to the Rule 24 response on which she is relying. She submitted that there is no misunderstanding or misinterpretation by the judge relating to the matters raised in paragraph 5, which the appellant's representative objected to. The appellant can internally relocate or seek State protection in Zambia.
18. The Presenting Officer referred to Article 3 and submitted that the judge has implicitly and consistently dealt with this throughout the determination. She has referred to it at paragraph 3 of the determination and then goes on to consider all the evidence in the round and the conflicting evidence given by the 3 witnesses. She submitted that the judge has made clear why she found them not to be reliable witnesses and this has been properly thought out. At paragraph 15 of the determination the judge refers to discrepancies in the 2 death certificates and from paragraphs 16-21 of the determination the judge picks holes in the evidence given by the witnesses. She then correctly states at paragraph 23 that the appellant has not made an asylum claim and states "The appellant has not explained how it is she is not able to relocate within her country." The Presenting Officer submitted that if the appellant thinks she will be badly treated by her husband's family, she can relocate in Zambia. Although the appellant's evidence is that her uncle is a bad man, who threatened her, the actual evidence is against this as he raised the appellant's son and sent him to study medicine in China. The judge refers to internal relocation at paragraph 23 and goes on to consider the medical evidence at paragraph 24. She states that there are mental health facilities in Zambia and help for people with depression and she submitted that based on the case of N which is the relevant country guidance case, the appellant, with her medical condition, can return to Zambia.

19. The Presenting Officer submitted that the judge has dealt properly with Article 3 relating to the appellant's health and internal relocation and has given proper explanations for her credibility findings. She submitted that the evidence before the judge contained discrepancies and inconsistencies and on return to Zambia the appellant's 2 adult children can help her and support her.
20. The Presenting Officer submitted that this is an appellant who came to the United Kingdom aged 43. She stayed illegally and worked illegally so when the appellant's representative states that the appellant has no criminality in her background, this is clearly not the case.
21. The Presenting Officer submitted that Article 3 has been properly dealt with by the judge in the determination.
22. With regard to Article 8 she submitted that Article 8 has been dealt with properly by the judge. The judge dealt with the case of Edgehill. The Presenting Officer referred to the case of Haleemudeen [2014] EWCA Civ 558. At paragraphs 40 and 41 it is stated that the judge should deal with Article 8 on the basis of the appellant's private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the new Immigration Rules. The case states that these new provisions are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. She then referred me to the case of Rafiq [2014] EWHC 1644 (Admin) at paragraph 12 which refers to the said case of Edgehill and states that decision makers should approach an Article 8 claim using the test of the new Rules bearing in mind the provisions for exceptional circumstances. The case goes on to state that whether using the old Rules or the new Rules, the result should be the same. I was then referred to the case of Singh [2014] EWHC 2330 (Admin) which uses the same argument relating to Article 8.
23. The Presenting Officer submitted that based on the case law the judge was correct to approach this application based on the new Immigration Rules.
24. She submitted that this appellant does not have family life in the United Kingdom. Based on what the judge had before her she was entitled to make this finding. I was referred to paragraph 29 of the determination which states "Whilst the witnesses and their family members wish her to remain, she has not shown that they are her own family." The judge finds that the appellant has no special relationship with these people and based on what was before her the judge was entitled to find this.
25. With regard to private life the Presenting Officer submitted that this appellant has been in the United Kingdom illegally and has built a private life here while she was here illegally. She submitted that effective immigration control is important and in this case public interest must outweigh the appellant's rights. The appellant knew her circumstances as

did her family members. It was submitted that paragraph 30 of the determination first refers to section 117 of the Nationality, Immigration & Asylum Act 2002 and when this is considered, particularly 117B, it is clear that the judge is saying that little weight can be placed on the appellant's private life which was established when she was here unlawfully. The Presenting Officer submitted that Article 8 is not a freestanding matter. The appellant has shown that she prefers to live in the United Kingdom and has established her life here, but she has done so while she has been here illegally.

26. The Presenting Officer submitted that with regard to Article 3, even if I do not accept her submissions and even if the judge had believed everything the witnesses had said, there would be no real risk to this appellant on return to Zambia. She submitted that the appellant can go to Zambia and can live anywhere there. She has family members there and she can continue her relationships with the people in the United Kingdom while she is in Zambia.
27. She submitted therefore that the grounds of application are merely a disagreement with the judge's decision and I was asked to dismiss the appeal.
28. The appellant's representative submitted that the 2 cases of Singh and Rafiq refer to Edgehill and Haleemudeen but the case of Edgehill is relevant and should be given weight. She submitted that the Article 8 proportionality assessment in the determination is not sufficient and Article 3 has not been dealt with.
29. The representative submitted that the effect on the appellant's physical and moral integrity if she has to return to Zambia should have been dealt with in the determination but was not. He submitted that he is relying on the grounds of application and his skeleton argument submitting that the First-tier Judge's determination should be set aside.

## **Determination**

30. I am first of all going to consider Article 8 of ECHR and the way in which it was dealt with in the determination. The permission states that the grounds relating to Article 8 are not strong and amount primarily to a disagreement with the judge's findings.
31. This is an appellant who has been in the United Kingdom for almost 14 years but has always been here illegally. She has no family life in the United Kingdom. Her relationships in the United Kingdom are not with family members. Her family members are in Zambia. Because the evidence before the judge is found to be lacking in credibility, as is explained in the determination at paragraphs 12-21, the judge is entitled to come to the decision she did.

32. The judge however accepts that the appellant has a private life. Her findings about this are coloured by the witnesses not being reliable. Because of credibility issues the judge places less weight on the strength of the relationships. She finds there is no dependency among the appellant and her other witnesses. The judge has made it clear that she is aware that there are children of the witnesses in the United Kingdom but she finds that the appellant's private life can be maintained from a distance. She points out that the appellant's family members are in Zambia, including her son. Section 117B of the Nationality, Immigration & Asylum Act 2002 deals with public interest. Effective immigration control is in the public interest. The judge finds at paragraph 29 that the public interest in this appellant's removal must outweigh her rights and the rights of her friends here, including their children. The main reason for this is because she has lived and worked illegally for most, if not all of her time in the United Kingdom. The judge finds that it is reasonable for her to return to Zambia, pointing out that the appellant entered the UK on a transit visa and never intended to go to Germany which is where she was supposed to go.
33. The appellant's representative has stated that no proportionality assessment has been made by the judge and that the case of Razgar [2004] UKHC 27 has not been referred to. It is not necessary to specifically refer to Razgar. The judge has referred to Part 5A of the 2002 Act and section 117 which deals with the relevant public interest issues and has adequately explained why she finds that public interest must outweigh this appellant's rights and her friends' and their children's rights in the United Kingdom.
34. With regard to whether the old Rules or the new Rules are to be considered, the said cases of Haleemudeen, Rafiq and Singh make it clear that the new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Based on this, the results should be the same whether considered before or after the July 2012 changes. It is reasonable for a decision maker to approach the Article 8 claim using tests under the new Rules, bearing in mind the provisions for exceptional circumstances.
35. There is no error of law in the judge's determination relating to Article 8. The application is merely a disagreement with the judge's decision.
36. With regard to Article 3 this is referred to in the determination. It is mentioned at paragraphs 3, 6 and 11 and at paragraph 23 the judge states "The appellant never made any asylum claim and even if she was treated by the family in the way she describes, she has not explained how it is she is not able to relocate within the country." This is an Article 3 issue. With regard to her medical condition, the refusal letter refers to the case of N which is the relevant country guidance case and has to be considered by the judge. The judge deals with the appellant's medical



condition at paragraph 24 of the determination. She notes that the appellant's mental health problems are being treated and managed and she notes that there is access to medical facilities in her own country. There was nothing before the judge to indicate that on return to Zambia her medical condition would lead to her dying because of the lack of medical care or assistance from family and friends. The appellant has not put forward any reasons for her being at real risk if she returns to Zambia and internal relocation is a possibility for her. She has family members there. Article 3 is not engaged in this claim.

**DECISION**

37. I find that the judge has dealt with Article 8 and Article 3 properly in her determination and that there is no error of law.
38. Although the appellant has been in the United Kingdom for a long time, she cannot meet the terms of the Immigration Rules. This must weigh against her in any balancing exercise. Her time in the United Kingdom has been without status. This is extremely important when human rights are being considered against public interest.
39. As there is no material error of law in the judge's determination, the First-tier Tribunal's determination must stand. The appellant's application for leave to remain in the United Kingdom outside the Immigration Rules is dismissed.
40. Anonymity has not been directed.

Signed

Date 09/02/2015

Designated Judge Murray  
Judge of the Upper Tribunal