

**IN THE UPPER TRIBUNAL**

R (on the application of Msiza) v Secretary of State for the Home Department  
IJR [2015] UKUT 00483 (IAC)

Field House  
London

Friday, 14 August 2015

**BEFORE**

**UPPER TRIBUNAL JUDGE PETER LANE**

**Between**

**PEGGY PHUMZILE MSIZA**

Applicant

**and**

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

Respondent

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No appearance or representation on behalf of the Applicant

Ms J Gray, instructed by GLD appeared on behalf of the Respondent.

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**JUDGMENT**  
**(Given orally at hearing)**

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1. JUDGE LANE: This is an application by Ms Peggy Msiza for judicial review of the respondent's decision of 27 February 2014 to refuse to grant her leave to remain in the United Kingdom. Permission to bring judicial review proceedings was granted on 6 January 2015.
2. I need to deal first with the following procedural matter. There has been no appearance today by the applicant or anybody acting for the applicant.

The proceedings hitherto have, at times, been pursued by the applicant acting in person; but also at other times by the applicant acting through solicitors and other advisers. That was the position as recently as July this year because, amongst the documentation filed by the applicant following a grant of permission, is the skeleton argument settled by Mr King Wyn on 20 July 2015.

3. On 12 August 2015 the applicant submitted a form T484 to the Upper Tribunal at Field House, seeking an adjournment of today's hearing. The stated reason was that the applicant was unable to attend court on 14 August 2015 as her barrister was not available on this day. She asked for the case to be adjourned to another day. This application was brought before me on 12 August and I refused it, instructing the Tribunal's staff to communicate my decision to the applicant and to state that the reason for it was that it was possible for the applicant to obtain other Counsel or else attend in person. I am informed by staff that various attempts were made to contact the applicant to that effect but these attempts were unsuccessful, notwithstanding that the staff used the telephone number given by the applicant in connection with these proceedings.
4. Ms Gray, who appears on behalf of the respondent, tells me that those instructing her sent a letter to the applicant on Tuesday of this week, seeking to make sure she was in possession of all the documentation relevant to today's hearing. Telephone calls were also made by the Government Legal Department in connection with today's hearing and on one occasion, at least, when the telephone was answered and the Government Legal Department asked to speak to the applicant, the person who had answered the telephone terminated the call. Ms Gray invited me to proceed in the absence of the applicant.
5. In all the circumstances it appears to me to be entirely appropriate and in accordance with the overriding objective for me to do so. The applicant is plainly aware of the hearing scheduled for today; and has been for some time. The reason she gave for her belated application for an adjournment

was entirely unpersuasive. All reasonable attempts have been made to communicate to the applicant the refusal of her adjournment application. The applicant should, in any event, have realised that, since she had not received a positive response to that application, she should attend the hearing. I therefore concluded that the applicant has failed to give a satisfactory reason for her absence from the hearing and that it was appropriate, and indeed desirable in the interests of the overriding objective, for this hearing to proceed

6. So far as concerns the applicant's history outside the United Kingdom, the facts are as follows. She was born in September 1977 in South Africa, to South African parents. In 1985, when she was some 8 years old, her mother died. The applicant was taken two years later to Zimbabwe to stay with her aunt. At that point the applicant was 10 years old. She received her primary and secondary education in Zimbabwe, up to 1995. At that point her aunt died. In 1996 the applicant went back to South Africa in order to study for, and take, her A levels. She went back to Zimbabwe in 1997 but in 1998 she returned to South Africa for a period of some four years, in order to study at university there. In 2002 she went to Zimbabwe, after completing her degree.
7. The applicant then contends that difficulties surrounding her family arose in Zimbabwe, involving problems with ZANU-PF members. This led various nieces of the applicant to go to the United States but the applicant says she was unable to do likewise because of her work. In 2004, she therefore returned to South Africa, coming later in the same year to the United Kingdom. Whilst in the United Kingdom she studied; indeed, that was the basis upon which she entered the country.
8. The applicant returned to South Africa in 2005, while her United Kingdom visa was still valid, in order to apply from abroad for a further student visa. In 2009 she became unlawfully present in the United Kingdom and that unlawful status continues.

9. The decision under challenge is that of 27 February 2014. In order to understand it, we need to see what material was before the respondent. At page 20 of the bundle, there is a letter dated 31 January 2014, prepared by solicitors acting for the applicant. It said this about her life in South Africa:

“Our instruction is that though our client is a South African national she is not exposed to life in South Africa because she was not brought up in South Africa. Our client informed us that in or around 1985 her mother died and in 1987 she was taken to Zimbabwe by her only aunt who was then married to a Zimbabwean man. Whilst in Zimbabwe our client completed her primary and secondary education. In 1995 our client aunt died and she was forced to return to South Africa in 1996 to study for her A-Levels. In 1997 our client travelled to Zimbabwe to stay with her niece and returned to South Africa in 1998 and studied in South Africa University between 1998 and 2002. During the period of our client’s study in South Africa, she experienced bully and discrimination from the South African public because of her lack of exposure to South African culture. Upon the completion of her degree our client said it was very difficult for her to stay in South Africa and she had to return to Zimbabwe to stay with her niece with the view of working in Zimbabwe.”

There then followed a description of difficulties involving ZANU-PF, to which I have already made reference.

10. The letter continued by stating that “in 2008 our client’s father also died and since then she has lost contact with her stepmother and does not know her whereabouts till date.” It was then asserted that the applicant had established her private life in the United Kingdom over the past nine years and ten months. Of that period she was said to have been in the United Kingdom legally for five years and “only four years and ten months illegally”. The letter submitted that the proportion of time spent legally as opposed to illegally “weigh in our client’s favour ... It is submitted that this exceptional cultural factors will severely limit our client ability to enjoy her private life if she is returned to South Africa” (sic).

11. As Ms Gray points out, at this point there was no witness statement or any other substantive material underpinning the solicitor's letter. It is against that background that we must look at the decision letter of 27 February 2014.
12. As is normal in cases of this kind, that letter began by considering the rules relating to private life. The letter made reference to paragraph 276ADE, setting out the requirements to be satisfied including, for our purposes, various periods of time spent in the United Kingdom, which it is common ground the applicant cannot meet.
13. The contentious provision is paragraph 276ADE(vi), which deals with the position where a person has not lived continuously in the United Kingdom for twenty years but "has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK". What the decision of February 2014 said about that was as follows:

"At the time of your application you were aged 36. You were not under the age of 18 years. Neither were you aged 18 years or above and under 25 years of age. Therefore the Secretary of State is not satisfied that you can meet the requirements of Rule 276ADE(1)(iv) and (v). Having spent 27 years in your home country and in the absence of any evidence to the contrary, it is not accepted that in the period of time that you have been in the UK you have lost ties to your home country and therefore the Secretary of State is not satisfied that you can meet the requirements of Rule 276ADE(1)(vi)."

14. There was then an examination of whether there were exceptional circumstances, such as to compel the grant of leave outside the Rules on Article 8 ECHR grounds, after which it was stated in terms that no such circumstances had been detected.
15. In granting permission, the judge stated it was arguable:

"... that there is some misapprehension of the evidence in the decision letter in that the decision maker has stated that the applicant spent 27 years in her home country whereas the letter dated 13 January 2014

accompanying her application for leave indicated that she had only lived in South Africa for five years between the age of 19 and 24 years, that she has no relatives in South Africa and that she has lived in the United Kingdom twice as long as she has lived in South Africa. If so it is argued that the decision maker has not engaged with relevant evidence in that he or she has overlooked relevant evidence in the assessment of the no ties stipulation in paragraph 276ADE(vi) and for this reason arguably given inadequate reasons.”

16. After the grant of permission and, it would seem, as a direct response to it, the respondent issued a further decision letter dated 22 January 2015, served in February of this year. That letter again engaged with the issue as to whether there were exceptional circumstances in the applicant’s case. It also referred to the issue of ties to South Africa. At the bottom of its first page, the letter correctly noted that, in fact, the applicant had lived in South Africa for a combined period of fifteen years; that is to say, the first ten years of her life; the year that she spent studying for her A levels; and the four years that she spent studying at university.
17. The letter of 22 January continued by stating that it was not accepted by the respondent that in the period of time she has been in the United Kingdom the applicant had lost ties to South Africa. Nor was it accepted in those circumstances that she would face obstacles to her re-integration into South Africa. In particular, it was said that:

“On your client’s own evidence, she has spent some of her formative and educational years in South Africa. She speaks English and this is the main language in her home country. It is not accepted that she had no, or little, exposure to the cultural norms of South Africa. The Secretary of State acknowledges that the notion of ties involves more than merely remote or abstract links to the country of origin. The Secretary of State has given careful consideration to the information submitted with the application but is not satisfied that your client’s links to the way of life in her home country are merely remote or abstract. In all the circumstances, the Secretary of State is not satisfied that your client has no social, cultural or family ties with her home country or that it would not be reasonable or proportionate to

expect her to return. It is noted that your client is a healthy 37 year old female who is considered able to live an independent life in South Africa. There is nothing to prevent her from having contact with her friends in the UK by alternative methods such as telephone, Internet, letters and visits. Your client states that she has been educated in the UK, while it is accepted that she has undertaken some of her education in the UK it is also noted that your client has also completed some of her education in South Africa. In any case there your client would be able to benefit from using skills and qualifications which she obtained in the UK in order to find gainful employment in South Africa.”

18. There then followed an analysis of whether in all the circumstances the applicant’s case could be regarded as exceptional, warranting the grant of leave outside the Rules. Once again, it was considered that this was not the case.
19. The applicant’s skeleton argument makes no reference to the decision of 22 January 2015. That is significant for the purposes of these proceedings.
20. Ms Gray advances the case on behalf of the respondent on several bases. First, she submits that, taken in its own terms and particularly having regard to the material on which the respondent based her decision, the original decision of February 2014 was not unlawful. Secondly, she argues that, if the first letter cannot be said to be lawful in its own terms, then any defect in it was corrected by the decision of January 2015.
21. Ms Gray makes that alternative submission by reference to the case law of Nash v Chelsea College of Art and Design [2001] EWHC 538 and R (Hamasour) v Secretary of State for the Home Department [2015] UKUT 414 (IAC)<sup>1</sup>. Ms Gray says the position in the present proceedings falls within the first of the three possibilities set out by the Upper Tribunal in paragraph 17 of the decision in Hamasour; namely, that the second

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<sup>1</sup> “(1) Decision 2 is to be read as a continuum of Decision 1 ... supplementing it and so curing the defects I have found to be disclosed by it. It thus operates to render lawful Decision 1 where, absent Decision 2 it would not be;

(2) Decision 2 cannot be read together with Decision 1 so as to cure the defects disclosed by it. Decision 2 is relevant only to the issue of relief, given the discretionary nature of judicial review proceedings;

(3) Decision 2 is a ‘stand alone’ decision, not relevant to these proceedings, even to the extent of being relevant to the relief to be given but one that may generate its own, quite separate, route of challenge”.

decision should be read as a continuation of the first decision, supplementing it and so curing any defects in it. Ms Gray's "fallback" position is that, if that is not so, then the second of the three possibilities in paragraph 17 of Hamasour holds good; namely, that the second decision (even though it cannot be read together with the first decision so as to cure the first decision's defects) is lawful on its own terms, so that the application for judicial review must still fail because it would not be appropriate in the circumstances to grant any relief.

22. I have had regard to the submissions made by Ms Gray, both orally and in writing. I have come to the conclusion that the application must fail and I shall explain why.
23. The first reason is that I accept Ms Gray's primary submission that the original decision was not, in fact, unlawful in its own terms. I have spent some time describing the material upon which the respondent made that decision. It is frankly exiguous. Even though the statement on the second page of the decision, that the applicant spent twenty-seven years in her own country, was erroneous, on the facts presented to the respondent, the only rational answer to the applicant's application was the one she received. The applicant's life history showed that she had lived in South Africa for considerable periods of time. She had moved between South Africa and Zimbabwe on several occasions, not least in order to obtain an education in South Africa. She was a 37 year old lady with no known health problems. She has received what appears to be a high standard of education in South Africa and has supplemented that by various courses she has undertaken in the United Kingdom. She speaks English, which is the language of South Africa.
24. The question of "ties" within the meaning of the immigration rules has been the subject of judicial pronouncements in a number of cases. Most recently, perhaps most conveniently as providing a summary of the law, I turn to the Upper Tribunal decision in Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC). This makes reference both to



the earlier Tribunal decision of Ogundimu (Article 8- new rules) [2013] UKUT 00060 (IAC) and the Court of Appeal judgments in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 which approved what was said in Ogundimu. This was that the natural and ordinary meaning of the word 'ties' imports a concept involving something more than merely remote and abstract links to the country of proposed deportation and removal. It involves there being a continued connection to life in that country.

25. The Upper Tribunal in Ogundimu also stated that the test of ties was an exacting one that requires a rounded assessment of all the relevant circumstances and is not confined to social, cultural and family issues. That statement was approved by the Court of Appeal in YM and has been reiterated in Bossadi.
26. What we take from this is that the asserted absence of family members in the country of nationality of proposed return is in no sense always determinative. In the present case, even if the applicant has lost touch with her stepmother following the death of her father, there is no reason to suppose that she could not re-establish contact once returned to South Africa. But, even if she could not, she is relatively young, has received a good education and in all the circumstances is quite manifestly capable of living independently in South Africa.
27. For those reasons, therefore, I find that the decision letter of 27 February 2014 is not wrong in law despite the reference to twenty seven, as opposed to fifteen years, in South Africa. However, even if the erroneous reference could be said to be an error capable of going to the legality of that decision, it is manifest for the reasons I have given that the decision would have been bound to have been the same, even if the respondent had made it plain she accepted the applicant had only lived in South Africa for a total of fifteen years.
28. However, even if I am wrong in reaching these findings regarding the original letter, Ms Gray is correct to submit that the decision of January

2015 falls to be read as a continuation of the first decision, thus curing any defects there might be in it. No challenge has been made to the decision letter of 22 January 2015. I accept Ms Gray's submissions that it contains no error of law whatsoever. It engages fully and in detail with the applicant's history regarding South Africa and Zimbabwe. It is properly reasoned, both as to the issue of ties and as to the issue of whether there might be exceptional circumstances necessitating an Article 8 grant of leave.

29. The reason why I find the second decision must be treated as a continuation of the first decision is that I agree with Ms Gray that a consideration of the relevant factors, as articulated in Hamasour and Nash, lead to that conclusion.
30. In Hamasour the respondent had failed to take account of various strands of substantive evidence, in the form of witness statements and so forth. By contrast, in the present case, Ms Gray points out that the first decision plainly had regard to the submissions made by the solicitors acting for the applicant. The error in that decision was in the reference to time spent in South Africa. This is not, therefore, a case in which it could be properly said that the respondent is seeking to generate fresh reasons, by reference to material which she has not hitherto properly examined. There has been a delay in issuing the supplemental letter; but I agree with Ms Gray that in all the circumstances this is not fatal. In other words it does not drive me to adopt the second of the three possibilities in paragraph 17 of Hamasour. I also do not see anything else in the relevant case law that compels the conclusion that one should regard the letter of January 2015 as being divorced from the first decision. Accordingly, therefore, reading those two decisions together, there is no unlawfulness on the part of the respondent.
31. Finally, if I am wrong about that too, then it is manifestly the case that the second decision of January 2015 dealt lawfully with the issue of time spent in South Africa. From that point, therefore, it must have been plain to the

applicant and her advisers that there was no longer any legitimate purpose in pursuing these judicial review proceedings. On this basis also, therefore, it would be inappropriate to grant relief

32. For all these reasons this application is refused. ~~~~0~~~~