



**Upper Tribunal
(Immigration and Asylum Chamber)**
Number: AA/04663/2013

Appeal

THE IMMIGRATION ACTS

**Heard at Manchester
On 28th April, 2014**

**Determination Sent
On 8th May, 2014**

Before

Upper Tribunal Judge Chalkley

Between

ELIZABETH BERE

Appellant

and

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

Respondent

Representation:

For the Appellant: Mr J Nicholson of Counsel

For the Respondent: Mr Harrison, Home Office Presenting Officer

**DETERMINATION AND REASONS
FOR FINDING AN ERROR OF LAW**

1. The appellant was born on 26th March, 1970 and is a citizen of Zimbabwe, She originally came to the United Kingdom as a nurse in 2001. Her visa was extended in 2006 until 2011. She returned to Zimbabwe in 2005 on holiday briefly. Again, in 2009 she went back to Zimbabwe but returned during the currency of her existing visa in 2011.
2. On her return the appellant made application for asylum. The appellant appealed the decision of the Secretary of State for the Home Department taken on 26th April, 2013 to give directions for the appellant's removal.
3. The appellant appealed that decision and her appeal was heard by First-tier Tribunal Judge Simpson on 27th November, 2013.
4. The judge dismissed the appellant's asylum appeal humanitarian protection appeal and human rights appeal. In doing so nowhere in her determination does the judge record the appellant's immigration history and the fact that apart from 2009 to 2011 the appellant has been in the United Kingdom since 2001 as a nurse. Those facts were important because they were not taken into account by the First Tier Tribunal Judge when she considered the appellant's Article 8 appeal under Article 8 jurisprudence.
5. Before me, Mr Nicholson conceded that the appellant could not bring herself with the Immigration Rules. No challenge was made to the asylum, humanitarian protection or Article 3 claims.
6. He suggested that the determination could not stand because the First Tier Tribunal Judge misdirected herself at paragraph 29 by referring to "truly exceptional" in the context of the appellant's medical condition and that was clearly wrong. She also failed to take into account the appellant's length of residence in the United Kingdom and the fact that even though she left in 2009 and did not return until 2011, she did not lose her leave and in performing the Article 8 balancing exercise the First Tier Tribunal Judge failed to consider that the appellant had been in the United Kingdom working and making a valuable contribution. These were all relevant to a proper Article 8 consideration (see *Akhalu (Nigeria)* [2013] UKUT 400 (IAC))
7. Mr Harrison sought to persuade me that the determination was a careful and thorough document in which the First Tier Tribunal Judge does take particular care to weigh the evidence. He did however express some concern that the word "truly exceptional" were in quotation marks suggesting that perhaps the judge was looking for something exceptional.

8. I have concluded that I must set this determination aside. Without properly considering the appellant's immigration history one cannot be sure that the judge has taken properly into account the length of the appellant's stay, the fact that she had leave or the fact that since 2001, apart from holidays, she was working up to time she left in 2009 and that when she returned the appellant still had leave. The judge does not explain why the interference is justified.
9. At the hearing before me Mr Nicholson and Mr Harrison both agreed that the findings could not stand.
10. Mr Nicholson told me that his instructing solicitors had told him of a recent change in medication which would require and up to date medical report.
11. I drew their attention to paragraph 7 of the Senior President's Practice Statement which provides as follows:

“7 Disposal of appeals in Upper Tribunal

7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

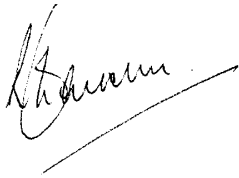
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary. 7”.

12. I indicated to the representatives, that I was minded, for reason set out in paragraph 13 below, to remit this appeal to the First Tier Tribunal for a fresh hearing. Both representatives agreed and neither sought to persuade me otherwise.

13. I am satisfied with that this is a case which falls squarely within paragraph 7 of the Senior President's Practice Statement, given the length of time the parties would have to wait for the matter to be relisted before me in Manchester once the appellant has a fresh medical report detailing her new medication and that it could, conversely be heard relatively speedily by the First Tier Tribunal and in view of the overriding objective informing the onward conduct of this appeal, I have decided that this appeal be remitted to the First-tier Tribunal for hearing afresh before a First Tier Tribunal Judge, other than First Tier Tribunal Judge AK Simpson.



Upper Tribunal Judge Chalkley