



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

Appeal Number: IA/01680/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke-on-Trent
On 15th July 2014**

**Determination
Promulgated
On 22nd July 2014**

Before

The President, The Hon. Mr Justice McCloskey

Between

PRIMROSE ONAYI MUDIYI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr Nyamaro, of Bake and Company Solicitors.
Respondent: Mr McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") dated 04 December 2013, which had the following elements:
 - (a) The Appellant's application under paragraph 317 of the Immigration Rules seeking indefinite leave to remain in the United Kingdom as the dependent relative (daughter) of a person present and settled here was refused.

- (b) It was concluded that the Appellant did not qualify under Appendix FM and paragraph 276 ADE of the Immigration Rules.
- (c) Finally, it was considered that the Appellant could not succeed outwith the framework of the Immigration Rules.

The Appellant is a national of Zimbabwe, aged 25 years.

- 2. The ensuing appeal to the First-tier Tribunal (the "FtT") was dismissed. Permission to appeal was granted on the following limited ground:

"The Judge considered the Appellant's Article 8 rights wholly within the context of Appendix FM and paragraph 276 ADE. Although the judgment in Edgehill post dates the determination, the Court of Appeal illuminates the law as it has always been and, consequently, an arguable error of law is disclosed on this ground."

The permission Judge added:

"In view of the findings of fact made by the Judge, it may be that the outcome will be the same notwithstanding the arguable error but, nonetheless, permission is granted on this basis solely."

- 3. Upon the hearing of the appeal, it became clear from the submissions of Mr Nyamaro that the high water mark of the Appellant's case was, relying on the decision of the Court of Appeal in Edgehill v Secretary of State for the Home Department [2014] EWCA Civ 402, that the FtT erred in law by failing to consider the Appellant's case under the former version of paragraph 317 of the Immigration Rules. This argument was based on the undisputed fact that the Appellant's application was made on 03 April 2012 and, hence, predated the change in the Rules, which took effect on 09 July 2012. Generally, Appendix FM establishes a route for entering or remaining in the United Kingdom for persons on the basis of their family life with a person who is, *inter alia*, settled in the United Kingdom. Under the changes effected to the rules on 09 July 2012, the Appellant, in order to satisfy the requirements of Section EC-DR.1.1, would have to establish that she required long-term personal care to perform every day tasks by reason of age, illness or disability: per paragraph 2.4. In contrast, under the regime governing applications made prior to the aforementioned date, the hurdle for the Appellant to overcome is that enshrined in paragraph 317(f) of the Rules, whereunder she must establish "*the most exceptional compassionate circumstances*".
- 4. Based on the decision in Edgehill, the Appellant's application to the Secretary of State was governed exclusively by paragraph 317 of the Rules. The provisions of Appendix FM rehearsed above were not applicable, as their entry into operation postdated her application. On the face of the determination, the FtT did not acknowledge this distinction and, hence, did not give effect to the decision in Edgehill. However, by the same token, the FtT did not proceed on the basis that the Appellant had to overcome paragraph ECDR.2.4 of Appendix FM. As a result, the self

evidently elevated threshold enshrined therein did not operate to the Appellant's detriment.

5. The substance of the FtT's decision is found, firstly, in [10] thereof:

"In relation to paragraph 317, the issue for determination is whether the Appellant would live in the most exceptional compassionate circumstances in Zimbabwe. I do not accept that she meets the high threshold required"

This was followed by a recitation of the Judge's reasons for this conclusion. None of this was the subject of the grant of permission to appeal and was not challenged in any event. The second component of the substance of the FtT's decision is found in [14]:

"... The Secretary of State considered whether the Appellant's case contained any compassionate and compelling circumstances which would justify granting further leave to remain outside the Immigration Rules including any delay in dealing with the Appellant's claim. In paragraph 3.2.7 of the October 2013 Guidance [it] states that 'exceptional does not mean unusual or unique ... exceptional means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate. That is likely to be the case only very rarely.'"

When asked, Mr Nyamaro confirmed that he was not challenging this formulation.

6. Disregarding completely section E-ECDR.2.4 of Appendix FM of the Rules, and thus taking the Appellant's case at its absolute zenith, it is clear from the evidence adduced and the findings made that she could not have hoped to succeed under any guise in any event.

7. My conclusions are:

- (a) While the FtT did not expressly acknowledge that the changes to the Rules introduced with effect from 09 July 2012 did not govern the Appellant's application, this was of no moment, since none of the revised provisions was applied to the Appellant's detriment.
- (b) In the alternative, if any error of law of the nature considered above did occur, this was immaterial, since the Appellant could not conceivably have succeeded in any event.

DECISION

8. I dismiss the appeal and affirm the decision of the First-tier Tribunal.

Seamus McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER
Date: 15 July 2014