Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48007/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24th June 2014	**On 9th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS MWIINJI NALWIMBA

Respondent

Representation:

For the Appellant: Mr Gregor Jack, Home Office Presenting Officer
For the Respondent: Ms Joy Kyakwita, Legal Representative.

DETERMINATION AND REASONS

Introduction

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Pacey) who, in a determination promulgated on the 1st April 2014, allowed the respondent's appeal against the refusal of her application for leave to remain on the basis of her established private life in the United Kingdom.

The primary decision

2. The Secretary of State's official (hereafter, "the decision-maker") considered the application under paragraph 276ADE(iv) of the Immigration Rules. This requires that the applicant, at the date of application –

> … is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment 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.

3. The material part of the decision-maker's explanatory letter to the respondent reads as follows:

> You entered the United Kingdom on 20th September 2004 and have not lived continuously in the UK for at least 20 years therefore the Secretary of State is not satisfied that you can meet the requirements of Rule 276ADE(iii).
>
> .....
>
> Having spent 21 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 therefor the Secretary of State is not satisfied that you can meet the requirements of Rule 276ADE(iv).

4. The decision-maker thereafter considered whether the application raised or contained any exceptional circumstances that might warrant consideration outside the Immigration Rules, but concluded that it did not. The decision-maker thus concluded that refusal of the respondent's application for leave to remain was compatible with her right to respect for private and family life as guaranteed by Article 8 of the 1950 European Convention for the Protection of Fundamental Human Rights and Freedoms.

The decision of the First-tier Tribunal

5. The Judge noted that the respondent had stated in her application that she had "no-one" in Zambia, that her whole family was in the UK (apart from a sister who was in Canada), and that the appellant spoke English and Bemba [paragraph 6]. It was the appellant's case that she had come to the United Kingdom in order to join her mother [paragraph 7]. Her mother had come to the United Kingdom in May 2003, the appellant had arrived in September 2004, and her father and brothers had joined them in December 2005. The respondent had been unable to obtain "a proper job" due to the fact that she had only one year remaining on her visa, and so she did part-time charity work with her Church in Hatfield. She moved from Hatfield to her parents' address in January 2014 [paragraph 13]. Although the appellant had previously asserted that she did not have any family members in

Zambia, she admitted at the hearing that she had in fact a number of aunts, uncles and cousins there [paragraphs 13, 19, and 21]. However, it was reasonable for the appellant not to class these relatives as 'family members; because she had grown up in a boarding school in Zambia, and had thus never developed any emotional ties to those relatives [paragraphs 19, 21 and 22].

6. The concluding paragraphs of the determination read as follows:

> [23] In my view, despite the undoubted facts that the Appellant is young, in good health and highly educated, she no longer has ties to Zambia. Her higher education was in the UK, all her immediate family are here and she has, clearly, no job in Zambia. [24] On the balance of probabilities and on the totality of the evidence before me, I find that the Appellant has discharged the balance the burden of proof. [25] I allow the appeal under the Immigration Rules.

7. A preliminary issue arose at the hearing before me as to what, precisely, the judge had found that the appellant had discharged the burden of proving. The references in paragraph 23 to the appellant being young, in good health, and highly educated, did not have any obvious relevance to the requirements for leave to remain under paragraph 276ADE of the Immigration Rules for being granted leave to remain on the basis of private life. It therefore appeared, at first blush, that the judge had found that the appellant had established the facts that were necessary necessary to found a claim that her removal would be incompatible with her right to respect for private life under Article 8 of the 1950 Human Rights Convention. However, the representatives ultimately agreed that the statement in paragraph 25, that the appeal was allowed "under the Immigration Rules", demonstrated that the judge was in fact finding that the appellant had discharged the burden of proving that she met the requirements of paragraph 275ADE of the Immigration Rules. The arguments of the representatives were thus predicated upon this assumption.

Error of law analysis

8. The Secretary of State's argument may conveniently be summarised as follows. The assessment of a person's ties to her country of origin should be approached holistically. To focus exclusively upon the respondent's family ties to Zambia was thus an error of law. Those ties should have been considered within the broader context of the respondent's social, cultural and other ties to Zambia. Given that the respondent had lived in Zambia until the age of 21 and had retained some (albeit not close) family ties to Zambia, the finding that the respondent had "no ties" to Zambia was perverse. Furthermore, the judge had conflated the issues of private and family life. Whilst the judge's reference to the lack of emotional ties to her family members in Zambia may well have been relevant to the issue of the existence of the respondent's *family life* in that country, it was irrelevant to the issue of whether she had ties to that country for the purpose of assessing her *private life*. What was relevant for the purposes of paragraph

276ADE was whether the respondent's remaining ties to Zambia offered a practical possibility of her relocating to that country. The presence of family members in Zambia constituted a private life tie that would aid the respondent in establishing her own private life upon return to Zambia.

9. In response to the Secretary of State's arguments, Ms Kyakwita submitted that the judge's conclusions had been reasonably open to her on the evidence. She stressed that a 'tie' means more than just having the nationality of the country in question, or having remote or abstract links to it. It involved there being a continued connection to life in that country, something which ties an applicant to their country of origin. She submitted that the judge was right to consider that the respondent did not have continuing 'ties' to Zambia in the sense that this term was properly to be understood.

10. In general, I prefer the arguments of the Secretary of State. I do not however agree with the argument that the judge conflated the concepts of private and family life. It is clear that the judge's reference in paragraph 21 to the respondent's lack of emotional ties to her relatives in Zambia was one that was made within the context of her accepting the respondent's explanation for why she had not previously mentioned their existence. That finding was thus of relevance to an issue of credibility that had arisen during the course of the hearing, rather than an indication that the judge was conflating the concepts of private and family life. I do however agree that the focus of the judge's attention with regard to the respondent's claimed lack of ties was too narrow, and that it should have encompassed all such ties, including the social, cultural and family ties. It was clear from a combination of all the surrounding circumstances (such as the age at which the respondent had left Zambia) and her admitted familial links to Zambia, that the respondent continued to have meaningful ties to her country of origin, notwithstanding the fact that she had not visited it since hear arrival in the United Kingdom some 9 years earlier. The Tribunal's finding that the respondent had met the requirements of paragraph 276ADE was thus contrary to the evidence. It is therefore set aside.

Re-determination of the appeal

11. This seems to me to be an appropriate case in which to remake the decision on the basis of the evidence that was before the First-tier Tribunal, without a further hearing. For the reasons that I have already given, the respondent does not meet the requirements for leave to remain on the basis of private life under paragraph 276ADE. The question therefore arises as to whether there are compelling circumstances, not contemplated by the Immigration Rules, that would render the respondent's removal unjustifiably harsh and thus disproportionate for the purposes of Article 8 of the 1950 European Convention of Human Rights and Fundamental Freedoms (Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)). In my judgement, there are not. The respondent has only ever had the benefit of limited leave to remain. She therefore established her private life in the United Kingdom in the knowledge that she may one day have to

return to Zambia. She retains cultural ties to Zambia, having spent just short of the first 23 years of her life in that country. She continues to be able to speak Bemba. Whilst she is currently financially dependent upon her parents in the United Kingdom, that dependency is a consequence of the very fact that she has only limited leave to remain, and is thus now liable to be removed from the United Kingdom. It is undoubtedly true that the appellant has far stronger emotional ties to family members in the United Kingdom than to those in Zambia. On the other hand, she was already estranged from those family members prior to her arrival in the United Kingdom, and Article 8 does not impose a general obligation upon a state to respect a family's choice of residence (Abdulaziz, Cabales and Balkandali v United Kingdom [1985] ECHR 7). I therefore conclude that whilst the respondent's removal to Zambia may cause her a degree of hardship, this is outweighed by the legitimate aim of maintaining the economic well-being of the country through the consistent application of immigration controls.

Decision

12. The Secretary of State's appeal is allowed.

13. The decision of the First-tier Tribunal to allow the appeal against refusal of further leave to remain in the United Kingdom is therefore set aside and is substituted by a decision to dismiss that appeal.

Anonymity is not directed

Signed Date

David Kelly

Deputy Judge of the Upper Tribunal