Upper Tribunal
Asylum and Immigration Tribunal Appeal Number: IA/18044/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 June 2015

Decision and Reasons Promulgated
On 16 June 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MS TM
(Anonymity direction made)

Appellant

and

THE SECRETARY Of STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Mr Joseph of Counsel
For the respondent: Mr D Clerk Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department. The respondent is a citizen of Tanzania born on 8 June 1989. However for the sake of convenience, I shall refer to Miss TM as the appellant and the Secretary of State as the respondent which are the designations they had before the First-tier Tribunal.

2. The appellant appealed to the First-tier Tribunal against the decision of the respondent dated June 2013 which was refused with no right of appeal. The appellant then requested that a new decision to be issued and on 10 April 2014 her application was refused with an in country right of appeal. First Tier Tribunal Judge Widdup allowed the appellant's appeal in a determination dated 19 February 2015.

3. Permission to appeal was granted by First-tier Tribunal Judge Pirotta on 24 April 2015 stating that it is arguable that the Judge materially erred in law by making his decision by reference to a version of paragraph 276 ADE which was not in force at the date of decision and failed to apply the relevant case law guidance under **Bossadi (276 ADE) [2015] UK UT 42 (IAC).** He further found that Judge did not apply the correct criteria by section 117B implicitly or explicitly. The Judge only considered the appellant's ability to speak English and economic viability no other public interest factors were taken into account.

First-tier Tribunal's findings

4. The Judge made the following findings in his determination which in summary are the following.

   I. [Paragraph 26] "I found both the appellant and her mother to be credible witnesses. Their accounts were largely consistent and they did not appear to be embellishing their evidence.

   II. [Paragraph 27] "I will start by considering the submission that the appeal can succeed under paragraph 276 ADE (vi)".

   III. [Paragraph 29] "the question therefore is whether there are very significant obstacles to the appellant's integration if returned to Tanzania".

   IV. [Paragraph 30] "I accept the evidence that the appellant has lived with her mother since 2005 and that there would be real difficulties for her if she had to return to live in Tanzania. Although she has cultural links to that country she has never lived there as an adult. There is no evidence that she has close relatives in Tanzania and her own evidence and that of her mother is that she has no close personal ties to that country. I take into account that it is now 10 years since she left Tanzania and I find on the evidence before me that the appellant, if returned there, would be faced with very considerable difficulty of re-establishing herself there".

   V. [Paragraph 32] "this is a highly fact sensitive issue and I find that in this appellant's case the difficulties she would have on returning to Tanzania do indeed reach the threshold of being

very significant obstacles and the appeal therefore succeeds under the Immigration Rules."

VI. [Paragraph 33] "However, lest I am considered to be wrong in that analysis, (allowing the appeal pursuant to the Immigration Rules) I find that the appellant and her mother continue to enjoy family life even though the appellant is now 25. I have already referred to the sheltered nature of her life with her mother. There is I find a financial and emotional dependency of the appellant on her mother and also a clear and strong dependency of the mother on the appellant".

VII. [Paragraph 34] This dependency "rises to a large extent from the mother's illness although I have not been given recent medical reports I find that the mother was diagnosed with cancer in 2012/13. The medical reports referred to there being some delay in diagnosis. Thus treatment started later than it should. The cancer is rare and the chemotherapy may not be effective. There appeared to be some inconsistency between the mother and the appellant about the progress of her treatment. I do not regard that as being a material inconsistency because the mother may have been told things about her illness of which the appellant is not fully aware. Suffice it to say that this is a serious illness and there is no evidence that the mother is in remission and no longer in need of the appellant's practical and emotional support".

VIII. [Paragraph 36] "I must decide whether or not there are compelling factors which would mean that this was an exceptional case where it would be appropriate to allow the appeal on human rights grounds even though the appellant cannot succeed under the rules".

IX. [Paragraph 39] "I find that the appellant has family life with her mother. The family unit consists of the mother and daughter and possibly A (the appellant's sister). I am mainly concerned with the mother and the appellant. I have no hesitation in finding that the return of the appellant to Tanzania will have consequences of sufficient gravity as to engage Article 8. I must take into account the impact on the family as a whole and I find that the departure of the appellant will have a considerable impact on the mother in her present vulnerable state of health".

X. [Paragraph 42] "I take into account section 117B of the 2014 Act. In this case there are two factors which are of relevance but neither have any adverse impact on the appellant. Firstly, English is her first language. Secondly, although she is not working she has good academic qualifications and has

completed an IT course. I accept her evidence that she would like to work and there would appear to be no reason why she should not be able to get employment".

XI. [Paragraph 43] "I have already considered relating to the difficulties she would have returning to Tanzania are of relevance when considering the proportionality."

XII. [Paragraph 44] "I find that there are compelling circumstances in this case which makes this decision disproportionate. Those circumstances are not merely the difficulties the appellant would have on return to Tanzania, but also the relationship between the mother and the appellant, and the important assistance the appellant is providing for her mother during her illness"

XIII. "The appeal is allowed on human rights grounds and under the Immigration Rules".

Grounds of appeal

5. The respondent in her two grounds of appeal states the following which I summarise. In respect of the first ground of appeal, the Judge refers to a version of rule 276 ADE (1) that was not in force at the time of the respondent's decision of 10 April 2014.

6. The second ground of appeal is that the Judge failed to conduct the proportionality assessment correctly for the purposes of Article 8 (2). The Judge failed to adequately consider section 117B either implicitly or explicitly. He only considered the appellant's ability to speak English but failed to consider any other public interest factors particularised within section 117B most notably 117B (i), (3)& (4). Failure to do so constitutes a material error of law. The judge failed to take into account the case of **Hummayun v Secretary of State for the home Department [2014] EWHC, 2901 (admin) (4 July 2014)** where it is stated that the mere fact that the claimant may have explained exceptional circumstances is merely one side of the proportionality equation. The public interest consideration on the other side of the equation need also to be placed into the balance there with. The upper Tribunal case **McLarty (deportation-proportionality balance) [2014 UKUT 315 (IAC)** at paragraph 29, 42 and 43.

7. In **DM (Zambia) v SS HD (2009) EWCA Civ**, Sedley LJ said that "the court has said many times that you cannot dispose of an Article 8 proportionality issue in a perfunctory of formalistic way. It requires a structured decision, however economically expressed".

8. The Judge failed to take into account Appendix FM when considering the case for the appellant remaining in the United Kingdom on the basis of her family life. In the case of **PG (USA) v the Secretary of State for the home Department [2015] EW CA C IV 118,** at paragraph 27 it is stated "in considering proportionality in this context, the case for remaining in the United Kingdom on the basis of private and family life needs to be considered against the relevant policy of the Secretary of State. As BeastonLJ observed in **Meera Haleemudeen v SS HD [2014] EW CA C IV 558 "**these new provisions in the immigration rules (in force since 9 July 2012) are a central part of the legislative and policy context in which the interests of immigration control a balanced against the interests and right of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy is when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new rules then it had previously been. The new rules require stronger bonds with the United Kingdom before leave will be given under them. By failing to consider Appendix FM in the proportionality assessment constitutes a material error in law.

The Rule 24 response

9. The Rule 24 response stated the following which I summarise. The Judge considered the appellant's appeal under the Immigration Rules and then went on to consider the appeal pursuant to Article 8 of the European Convention on human rights. She allowed the appeal on human rights grounds and under the immigration rules. "The reasons for decision of granting permission only dealt with allowing the appeal under the rules and not allowing under HR grounds. Hence it is respectfully submitted that no permission has been given to hear the human rights part of the appeal".

The hearing

10. At the hearing and heard submissions from both parties as to whether there is an error of law in the determination.

Decision on error of law

11. The Judge allowed the appellant's appeal pursuant to the Immigration Rules and said that if he is wrong in his analysis in respect of the immigration rules, he allows the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights.

12. It is argued by Mr Joseph at the hearing and in the appellant's Rule 24 response that decision which granted permission to appeal only dealt with the Judges error in respect of the Immigration Rules and not under the Human Rights grounds. Therefore it is submitted that no

permission has been given to hear the human rights part of the appeal.

13. I do not accept this argument. The permission Judge after he considered the error of law in respect of the Immigration Rules stated that Judge did not apply the correct criteria by section 117B implicitly or explicitly in his determination of proportionality. This refers to the proportionality exercise pursuant to Article 8.

14. The Judge made a material error in law in respect of his consideration of the Immigration Rules as he referred to paragraph 276 ADE as the relevant rule which however was not in force at the date of decision. The determination therefore cannot stand as the wrong test was applied by the Judge. Mr Joseph argued that it is the respondent in her refusal letter who made the mistake in the first place and the Judge merely followed suit. This does not however correct the error of law.

15. I therefore set aside the determination in respect of the findings pursuant to the Immigration Rules.

16. The Judge also fell into material error when he allowed the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights because he did not address and resolve all the criteria set out in paragraph 117B of the Immigration Rules in his proportionality exercise. The Judge did not consider that a case for remaining in the United Kingdom on the basis of private and family life needs to be considered against the relevant policy of the Secretary of State as set out in paragraph 117B.

17. The Judge merely considered one aspect of that paragraph 117B which was that the appellant speaks English and will be able to be economically independent and therefore not a burden on the State. In the case of **AM (S117B) Malawi [2015] UKUT 0260 (IAC)** it is stated in the headnote that an appellant can obtain no possible right to a grant of leave to remain from either section 117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources".

18. Whatever the merits of the appeal, the Judge was nevertheless required to take this important consideration into account in his proportionality assessment of the appellant's family and private life in this country. The Judge's failure to take into account in his proportionality exercise the respondent's policy brought him into material error.

19. The upshot is that the determination of the Judge is affected by a material error by his failure to conduct a proper assessment of the

appellant's Article 8 rights even if his conclusion might ultimately have been that she is entitled for further leave to remain.

20. I find that there is a material error of law in the determination of First-tier Tribunal and I set it aside in its entirety.

21. Mr Joseph made an application for the appeal to be remitted to the First-tier Tribunal for findings of fact to be made. I was of the view that it would be appropriate in the circumstances and in accordance with the Presidents Practice Directions for it to be remitted for findings of fact to be made and that the first-tier Tribunal is a better forum.

22. I direct that the appeal be placed before any Judge of the First-tier Tribunal other than Judge Widdup on the first available date.

23. I also note that there has been a previous determination for this appellant which had not been brought to the attention of the previous Judge. This determination should be taken into account by the First-tier Tribunal according to the principles set out in the case of **Devasaleen** that the findings therein should be the starting point for any redetermination**.**

DECISION

The Secretary of State appeal is allowed

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana Dated 12th day of June 2015