



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

Appeal Number: IA/19415/2014

THE IMMIGRATION ACTS

Heard at Field House

On 24 February 2015

**Decision & Reasons
Promulgated
On 5 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

**MISS OLIVIA HLALO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr A Corban (Counsel instructed by Corban Solicitors)
For the Respondent: Ms A Holmes (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant whose date of birth is 6 July 1961 is a citizen of Zimbabwe. In a determination promulgated on 26 November 2014 the First-tier Tribunal (J D L Edwards) dismissed the appeal on human rights grounds and under the Immigration Rules.

Background

2. She entered the UK on 28 November 2001 as a visitor with leave valid until 28 May 2002. Thereafter she applied for leave to remain as a student and five extensions of leave were granted. On 26 August 2010 she applied for leave to remain as a Tier 4 (General) Student which was refused and she was appeal rights exhausted on 2 March 2011. An application for leave outside of the Rules was made and refused on 26 July 2011. The present application under Article 8 of the Human Rights Convention, was refused by the respondent on 8 April 2014. The appellant met the requirements of paragraph 276ADE(i) and (ii) but not (iii)-(iv) as she had lived in the UK for a period of less than thirteen years and failed to demonstrate that she has no ties including social, cultural or family in Zimbabwe.

Grounds of application

3. An application for permission was made contending that the Tribunal erred by misdirecting itself in relation to the relevant Rules and confused the requirements under paragraph 276ADE with those under Appendix FM (which were not relevant). Secondly, it was contended that the Tribunal failed to apply the principles in **Ogundimu (Article 8 - new Rules) Nigeria [2013] UKUT 60 (IAC)**. Further, the Tribunal failed to consider the best interests of the appellant's niece under Section 55 of the UKBA Act 2009 and failed to give adequate reasons for finding that family life was not engaged as between the appellant, her sister and niece. The Tribunal further failed to take into account that a substantial part of the period of residence (over 9 years) was lawful and the only factor weighing in favour of the removal decision was that the appellant had overstayed her leave to remain some three years ago.

Permission

4. Permission to appeal was granted by First-tier Tribunal Judge Mark Davies on 13 January 2015. He stated that the Tribunal appeared to have misdirected itself regarding the application of 276ADE and further that the Tribunal had not given the evidence the anxious scrutiny that is required particularly in relation to the Article 8 claim.

Error of Law Hearing

5. At the hearing Dr Corban relied on the grounds in the application for permission to appeal and expanded on the same.
6. Ms Holmes produced and relied on a Rule 24 response dated 22 January 2015 which had not appeared in the Tribunal file. The Respondent accepted that whilst the Tribunal may have incorrectly referred to the requirements to be a partner or a parent (under Appendix FM), this was not a material error given that there was no indication that the appellant could succeed under paragraph 276ADE of the Immigration Rules. The Tribunal's use of language raised some concerns in its consideration of

family life as between adults and Section 55 considerations, but such matters were not material to the outcome of the appeal. Further the findings as regards Article 8 and considerations of relevant factors were open to the judge to make. The grounds were no more than an argument with the findings made. Ms Holmes acknowledged that whilst there were some shortcomings in the determination it could not be shown that they were material errors of law.

7. Dr Corban responded that it was clear the Tribunal had not properly taken into account the nine to ten years' lawful leave and indeed referred to a "poor immigration history" which was clearly contrary to the evidence.

Discussion and decision

8. The appellant's grounds have been made out. I am satisfied that there are material errors of law in the First-tier Tribunal decision and reasons such that the decision should be set aside. It is clear that the Tribunal misdirected itself in relation to the requirements of the Rules when it referred to "she is neither a partner nor a parent" which are relevant to Appendix FM and not to paragraph 276ADE which was under consideration and was the only reason given for concluding that the requirements could not be met [21]. The Tribunal failed to demonstrate that it gave proper consideration to the provisions under paragraph 276 ADE. I reject the Secretary of State's submission that the error was not material given that the appellant was not able to show that she met the requirements under paragraph 276ADE. Even if that were the case the Tribunal went on to consider Article 8 ECHR but that consideration was flawed and inadequate, notwithstanding that the Tribunal placed weight on the public interest factors in "section 5A of the 2002 act"[22]. In the decision the Tribunal placed weight on the appellant's poor immigration history finding that her leave to remain expired some three years ago and that she had remained in the UK since. It further found that private life was acquired whilst unlawfully in the UK (22). There was no consideration, apart from at [3], given to the fact that the appellant lawfully entered the UK in 2001 and remained lawfully in the UK as a student until 2 March 2011.
9. Finally, the Tribunal has in my view simply disregarded the issue of "special dependency" and made no adequate findings or reasons for "disregarding" the claim that the appellant has been a second mother to her sister's children aged 23 and 17 years at the date of decision. She lived in their household in Zimbabwe and her sister is present and settled in the UK. Further the Tribunal failed to follow the step by step approach to Article 8 as identified by Lord Bingham in **R (Razgar) v SSHD [2004] UKHL 27.**

Decision

10. **The Tribunal erred materially for the reasons identified. The appeal is allowed. I set aside the decision pursuant to Section**

12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and further to 27.2(b) of the Presidential Practice Statement.

- 11. The matter will be re-remitted to Hatton Cross (excluding Judge J D L Edwards) on a date to be fixed with a time estimate of two hours (two witnesses to be called) and no interpreter is needed.**

No anonymity order.

Signed

Dated 4.3.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

No fee award.

Signed

Date 4.3.2015

Deputy Upper Tribunal Judge G A Black