



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

**Appeal Number: IA/27376/2013**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2 September 2015**

**Decision & Reasons Promulgated  
On 12 October 2015**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**S B M  
[ANONYMITY ORDER MADE]**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Adrian Berry, instructed by Fursdon Knapper solicitors  
For the Respondent: Ms Julie Isherwood, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

- 1.** The appellant is a Malawi citizen who appeals with permission against the decision of Upper Tribunal Judge Hanson who dismissed her appeal against the respondent's refusal of further leave to remain as the spouse of a British citizen.

## **Background**

- 2.** The appellant was born in Zimbabwe in 1985: although she is a Malawi citizen, she has never lived there. Her parents died when she was young, and distant relatives brought her up. She has sisters and a family friend living in the United Kingdom and in October 2004 she came to visit them here. She travelled on her Malawi passport and her visa was granted at the airport on arrival.
- 3.** After her arrival the appellant went to live with one of her sisters and in 2005 she began studying in London for a Bachelor's Degree in Business Administration. She graduated at the beginning of 2009. She then enrolled for an MBA in Financial and Computer Management, but in early 2009 she became pregnant and was unable to complete that 18-month course. All of her study was with leave. The appellant has completed an OCR level 2 in Health and Social Care (Adults) and started an Access to Nursing course in September 2013, which due to her status she cannot pursue. She would like to qualify as a nurse and she has worked as a care worker.
- 4.** In 2006 she became acquainted with the man who is now her husband, but their friendship did not become a relationship until 2009, when she was pregnant with her son, whose father had and has no interest in the pregnancy or the child. The appellant married her British husband in July 2009, three months before the child was born. Her husband is not the child's natural father but he is the only father the child has known. He also has a 9 year old child who lives with the child's mother and whom the appellant's husband sees regularly.
- 5.** The appellant's son is now 5 years old and like his mother, he is a Malawi citizen. The appellant says she omitted him from her FLR(M) form in order to save the additional fees. She does not dispute that deception, or the deception regarding her bank accounts.
- 6.** The appellant has three sisters here and one in Australia. She has no family in Malawi. All three of her sisters here are now British citizens, married to British citizen husbands and with children of their own. The appellant and her son have a lot of contact with her extended family.

## **Procedural history**

- 7.** The appeal history is as follows: the appellant came to the United Kingdom as a visitor in October 2004 and obtained leave to remain, first as a student, then as a spouse. Her last leave to remain expired on 5 August 2012.
- 8.** The appellant made an in time application to extend that leave, which the respondent refused, on the basis, *inter alia*, that the appellant had submitted false bank statements to support her application. The appellant appealed to the First-tier Tribunal, which found that she had indeed knowingly submitted false documents with her application, and also, based on evidence at the First-tier Tribunal hearing, that she had not disclosed

the existence of her child from a previous relationship, born in October 2009. The child was over 4 years old by the time his existence was disclosed.

- 9.** The First-tier Tribunal allowed the appeal outside the Rules under Article 8 ECHR, finding that the appellant had never lived in Malawi, despite her nationality, and that she had no meaningful links there; and that she would face difficulties in maintaining and accommodating herself and her child in Malawi, which would 'lead to hardship that would go beyond the baseline'.
- 10.** Leave to remain as a spouse was granted for the first time in August 2010 when the child was just 10 months old. The Tribunal found that the appellant's husband, with whom she lived, was the only father her son had known. The Tribunal also accepted that the appellant's husband was in employment. The Tribunal considered that the husband could not reasonably be asked to leave the United Kingdom and that the child's best interests lay in growing up in the family in which he had lived all his life.
- 11.** The respondent successfully challenged that decision, finding that the First-tier Tribunal had not properly approached Article 8 outside the Rules, in particular failing to reason sufficiently the hardship finding on *Nagre* principles; and that no weight had been given to the respondent's unparticularised indication in the refusal letter that reintegration assistance might be available to the appellant. The Upper Tribunal set aside the First-tier Tribunal decision and substituted a decision dismissing the appeal on all grounds, relying on the reintegration assistance.
- 12.** The appellant appealed to the Court of Appeal, which has remitted the appeal to the Upper Tribunal, with the consent of the parties, on the basis that the Upper Tribunal erred in relying on the availability of reintegration assistance in Malawi, since there was insufficient and/or no evidence upon which the Upper Tribunal could reach that conclusion.
- 13.** It follows that the question of error of law is not in issue. The Upper Tribunal must proceed to consider whether to remake the decision. That was the basis on which the appeal came before me.

### **Upper Tribunal hearing**

- 14.** I heard submissions from Mr Berry for the appellant, which followed the procedural history. Mr Berry argued that as far as the Immigration Rules are concerned, there was no possibility of continuing the family unit in Malawi; the husband would have to choose which of his children to lose, since the elder one would remain in the United Kingdom with his mother.
- 15.** There was no suggestion that the parties were a burden on the public purse; the husband and the appellant had worked and sustained themselves financially, albeit not at the level which the Rules required. The marriage was subsisting and the appellant's oral evidence and that of her husband stood unchallenged.

16. Mr Berry accepted that the appellant had used deception but the respondent had a discretion as to whether to refuse leave to remain under para 322(1A). Although the Rules indicated that leave 'should normally' be refused, the respondent had the choice not to refuse in these circumstances. Mr Berry asked me to allow the appeal.
17. For the respondent, Ms Isherwood pointed out that the child was not a qualifying child as defined in part 5A of the Nationality, Immigration and Asylum Act 2002 because he had not been in the United Kingdom for 7 years (he is still only 5 years old) and is not a British citizen. The existence of the child therefore added no additional weight to the appellant's case. The suggestion that the child's father had taken no interest in him sat oddly with the birth certificate, which showed him as the informant as to the birth of the child.
18. Paragraph 117B(3) and 117B(4) were applicable. The appellant's deception could not be ignored and the appellant was therefore excluded from leave to remain by the suitability criteria.
19. As to the reliance on public funds, although the couple were not in receipt of benefits, the child was receiving free education at school, which was a financial burden to the United Kingdom. The factual findings of the First-tier Tribunal had been retained and they were insufficient to demonstrate compelling circumstances outside the Rules. Ms Isherwood asked me to dismiss the appeal.

## Discussion

20. The appellant admits that she used deception in her application. She used false documents, and she also omitted mention of her child, in order to pay a lower fee. Mr Berry's submission that the respondent has a discretion in these circumstances is erroneous: paragraph 322(1A) reads as follows:

"322. In addition to the grounds for refusal of extension of stay set out in parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave:

**Grounds on which leave to remain and variation of leave to remain are to be refused; ...**

(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application; ..."

The language of the Rule is mandatory and plainly applicable here. The appellant cannot bring herself within the Rules.

- 21.** The next question is whether there are exceptional compelling circumstances for which leave to remain ought to be given outside the Rules. The First-tier Tribunal made findings of fact, which were preserved in the decision of the Upper Tribunal. So far as relevant, the findings made were these: the child was born in the United Kingdom; he had recently begun nursery education; he has lived only in the United Kingdom and his mother the appellant may face uncertainties due to her lack of contact with Malawi and Zimbabwe since 2004; the removal of his mother would interrupt the child's relationship with his mother's husband and his *de facto* parent; and that it is in the child's best interests to remain in the United Kingdom.
- 22.** The Judge accepted that it was unreasonable to expect the appellant's husband to accompany them to Malawi (or Zimbabwe if they go there) and that the relationship of husband and wife was genuine and subsisting. The appellant had been in the United Kingdom lawfully for a long period and had not relied on public funds.
- 23.** The Judge did give weight to the deceit of the appellant in her application. There is no reasoning in relation to hardship. The evidence is an assertion by both the appellant and her husband that she would cope poorly in Zimbabwe if she returned there, and that she has no connection with Malawi. The respondent's decision under section 47 of the Immigration Asylum and Nationality Act 2006 (as amended) was that she be removed to Malawi only; Zimbabwe is not in issue.
- 24.** Little weight can be given to the private life the appellant and her child have developed in the United Kingdom with her extended family, since at all times she has had precarious leave. Weight must be given to her family life with her child, and with her husband. The First-tier Tribunal's finding that the appellant's husband cannot be expected to go to Zimbabwe does not really assist because it is to Malawi that the respondent intends to remove the appellant.
- 25.** Apart from her lack of connection to Malawi due to having been born and lived in Zimbabwe, the appellant has advanced no other evidence as to conditions in Malawi to support her assertion of hardship there after her return. Nor is there detailed evidence about her husband's relationship with his older child, or his employment circumstances. I am not satisfied on the facts of this appeal that the appellant's circumstances are exceptional and compelling in the *Nagre* sense, such that the respondent should grant her leave to remain outside the Rules despite her failure to meet the Rules on the grounds of deceit.

### **Conclusions:**

The decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision and I re-make the decision in the appeal by dismissing it.

### **Anonymity**

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Subject to any written representations which may be received from the appellant, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, that order will stand discharged at the expiry of 14 days from the sending to the appellant of this decision.



Date:

Signed:

Upper Tribunal Judge Gleeson