



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

Appeal Number: IA/22995 /2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 24 August 2017**

**Decision & Reasons Promulgated  
On 4 September 2017**

**Before**

**UPPER TRIBUNAL JUDGE KEKIĆ**

**Between**

**NELLY CHAKOTA  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms K Tobin, of Counsel, instructed by Bespoke Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant challenges the determination of First-tier Tribunal Judge Hunter dismissing her appeal against the respondent's refusal on 5 June 2015 to grant her leave to remain on the basis of her private and family life. The appeal was dismissed by way of a determination promulgated on 12 December 2016 following hearings at Hatton Cross on 9 June and 10 October 2016. The first hearing was adjourned part heard to enable the appellant to submit documentary

evidence of her partner's ability to maintain her but this evidence did not materialise.

2. The appellant is a Zambian national born on 22 July 1974 who arrived here with a visit visa on 17 March 2002 and overstayed. It was not until 30 December 2008 that she sought to regularize her stay. Her application was refused on 10 May 2010. The appellant then waited until 18 May 2002 to make a second application which was refused on 12 July 2013. After another delay, this time of some 12 months, a further application was made on 7 July 2014, and on 27 March 2015 the appellant responded to a section 120 notice issued in March 2015. Further information was submitted to the respondent on 10 April 2015.
3. The grounds do not seek to challenge the judge's findings under the Immigration Rules but take issue with the judge's approach and findings to the article 8 assessment outside the rules. Permission to appeal was initially refused by Designated First-tier Tribunal Judge Murray on 23 May 2017 but was granted upon renewal by Upper Tribunal Judge Plimmer on 29 June 2017 on the basis that the judge arguably failed to address article 8.
4. At the hearing on 24 August 2017, I heard submissions from the parties.
5. Ms Tobin submitted that in view of the respondent's concession that there had been an error in the judge's approach to article 8, the issue was whether the error was material. She submitted that there had not been a holistic assessment of article 8 outside the rules and that whereas the judge had looked at factors individually, he should have viewed them cumulatively and then decided whether a grant of discretionary leave was warranted. It was not possible to speculate on what the outcome would have been had the correct approach been followed.
6. In response, Mr Avery submitted that there was no material error. The judge had considered all the factors and properly applied the rules which were Parliament's expression of where the public interest lay. Even if a full assessment had been carried out, the judge would have taken the rules as his starting point and the outcome would have been the same. There were no compelling circumstances at all. With respect to the delay between 2008 and 2010, the Secretary of State was considering the claim; there were developments throughout that period. The case had no redeeming features at all.
7. Ms Tobin replied. She agreed that in most cases the rules addressed all the relevant factors but nevertheless judges had to undertake an

assessment and one could not speculate on the outcome in this case if that assessment had been properly undertaken. The inability to meet the requirements of the rules was not determinative and nor was a lack of insurmountable obstacles. The judge had looked at factors in isolation when he should have considered them holistically. The matter needed to be re-heard and fresh evidence would be called.

8. At the conclusion of the hearing I reserved my determination which I now give.

### **Discussion and Conclusions**

9. No challenge is raised in respect of the findings of the judge on the Immigration Rules. The grounds and Ms Tobin's submissions focus on the failure to holistically consider all the factors put forward when assessing whether a grant of discretionary leave on article 8 grounds was warranted. The judge is criticized for looking at factors individually and then discounting them as not being exceptional.
10. The respondent conceded in her Rule 24 response that the judge erred in his approach; however, she argues, and this was expanded upon by Mr Avery in his submissions, that there has been no material error as the circumstances of the case are such that no other outcome could have been possible. Ms Tobin's response is that one cannot speculate as to what the outcome would have been as the judge did not undertake a holistic assessment.
11. The first issue I must, therefore, consider is whether the judge had made an error of law. I concur with the submissions of both parties that he did in that he failed to consider all the matters cumulatively in order to decide whether discretionary leave was warranted on article 8 grounds.
12. The next issue is whether this error is material. To put it another way, could any other outcome have been possible on the known facts which are, largely, accepted. In order to make that decision, I must consider what those factors are.
13. I would state at the outset that the grounds and the submissions at the hearing did not suggest that there were any matters, other than a contention of delay, that had not been considered when the judge undertook his assessment under the rules. Nor was there any attempt to identify any other matters which might be said to fall outside the parameters of the rules and which could only be assessed outside them. I, therefore, proceed on the basis that the relevant factors are

those which the appellant relied upon before the First-tier Tribunal Judge and which were considered under paragraph 276ADE along with the issue of the delay in decision making. I set out these matters in no particular order of priority.

14. The appellant was born in July 1974 and is a national of Zambia. She entered the UK as a visitor in March 2002. Her visa expired in August 2002 and she then overstayed for over 6 years before making an unsuccessful application for leave to remain in December 2008 which was refused in May 2010. She has not returned to Zambia since her arrival.
15. The appellant maintains that she was disadvantaged by the delay in the decision- making process between the making of her application on 30 December 2008 and its refusal on 10 May 2010.
16. The appellant continued to overstay between May 2010 and May 2012 when she made a human rights application which was refused in July 2013.
17. The appellant has a married sister in Essex with whom she initially lived when she came here. Her sister is said to have come here shortly before the appellant arrived.
18. The appellant has taken employment although it would appear that this is without permission from the respondent. She has also studied and obtained qualifications in areas such as the administration of medication.
19. The appellant met her partner, RP in 2003 and they commenced cohabitation in December 2009. They have not married. He is a British national born in January 1961 and is a self-employed painter and decorator with two adult children and three grandchildren. He has a good relationship with them. It would be possible to maintain contact by way of visits and modern means of communication. RP has lived here all his life. He has never been to Zambia but the judge found he would have some familiarity of the customs and culture through the appellant and that his employment skills could be used outside the UK. The judge also found that there was the possibility that he could sell his house and business to raise funds to help support himself and the appellant in Zambia.
20. The appellant meets the eligibility and suitability requirements of the rules.

21. The appellant's mother died in 1989 and her father left the family when she was young. She lived without parental support since the death of her mother.
22. Whilst there would be difficulties in moving to Zambia, the judge considered that those difficulties did not reach the threshold of insurmountable obstacles. Nor would there be very significant obstacles for the appellant to reintegrate to Zambia given that she had lived there for the majority of her life. The judge also found that she had acquired skills here which would assist her to find employment.
23. The relationship between the appellant and RP was formed at a time when both parties were aware of the appellant's status as an overstayer.
24. These factors demonstrate that the appellant's case is one of many similar cases that come before the Tribunal. Even taking account of the issue of delay, it is not possible that a holistic consideration of these matters would have led to a different outcome.
25. Significantly, given that there has been no challenge to the decision under the rules, it must be accepted that the appellant could not meet the insurmountable obstacles test. In that context, it is difficult to see how the claim could succeed outside the rules.
26. Moreover, the single 'exceptional' circumstance the judge is criticized for failing to consider holistically with all the other above mentioned factors, that of the 'delay' in decision making, is unparticularized. Firstly, I would state that the delay of some 16 months is modest and, as pointed out by Mr Avery, there were steps taken during that time by the respondent in that further evidence was sought and obtained from the appellant. More importantly, however, the appellant fails to explain how the delay has placed her at a disadvantage particularly in the context of her own delay of over six years in making an application to regularize her stay and then a further two years before another application was made.
27. It is, therefore, plain that even if the judge had considered the alleged delay along with all the other matters relied on, his decision would have been the same. This is a case where the appellant has deliberately flouted the rules and the law, has taken unlawful employment and has stayed put despite having no lawful leave for the vast majority of her stay. She has no children here and in the absence of any challenge to the judge's conclusion that there are no significant obstacles to her reintegration into Zambian society, it is

difficult to see why discretion should be exercised in her case. She can be expected to return either with her partner, whose circumstances were fully examined, or he can remain here and support any entry clearance application she may choose to make. Her circumstances could not possibly result in a grant of discretionary leave and the judge's error to holistically consider all relevant factors in his article 8 assessment is not material. It follows that the decision to dismiss the appeal stands.

**28. Decision**

29. The First-tier Tribunal made no material errors of law and the decision to dismiss the appeal stands.

**30. Anonymity**

31. I was not asked to make an anonymity order.

Signed

A handwritten signature in black ink, appearing to read "R. Keir". The signature is written in a cursive style with a small dot at the end.

Upper Tribunal Judge

Date: 1 September 2017