



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

**Appeal Number: UI-2021-001561  
On appeal from HU/52339/2021  
[IA/06540/2021]**

**THE IMMIGRATION ACTS**

**Heard at Birmingham CJC  
On the 15<sup>th</sup> September 2022**

**Decision & Reasons Promulgated  
On the 31 October 2022**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**NYAWA MATONGO  
(Anonymity Direction Not Made)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr J Wilson, Refugee and Migrant Centre

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

**DECISION AND REASONS**

**The Background**

1. The appellant is a national of Zambia. She arrived in the UK in January 2001 with a visit Visa valid from 13<sup>th</sup> December 2000 to 13<sup>th</sup> June 2001. She remained in the UK unlawfully when that visit Visa expired. Since February 2008 she has made a series of unsuccessful applications for leave to remain. Most recently, on 16<sup>th</sup> May 2017 the appellant applied

for leave to remain on family and private life grounds. She relied, in particular, upon her relationship with children, Longwani Nkwabilo and Lisa Nkwabilo.

2. That application was refused by the respondent for reasons set out in a decision dated 20<sup>th</sup> May 2021. The respondent gave several reasons. The respondent noted the appellant applied under the 'parent route', but she is in fact in a relationship with, and resides with her husband, Ronne Mutale Makumba, the father of the children. The respondent concluded the application falls for refusal on grounds of suitability. The respondent noted the appellant's partner, and her son, are both subject to deportation orders. The respondent concluded that the appellant had deliberately omitted her husband's details from her application to avoid the details of the deportation order made against him, impacting upon the outcome of her application and to give the impression that she has sole responsibility for her daughter. The respondent concluded that the appellant and her family have previously lived in Zambia as a family unit and taking into account the best interests of the appellant's daughter (*who is now a British Citizen*) in particular, it would not be unreasonable to expect the child to leave the UK. The respondent noted that the appellant's daughter had resided in the UK continuously for 17 years and 6 months, however there was no evidence that she is either working or studying in the UK. The respondent referred to the length of the appellant's residence in the UK and said that the appellant had failed to provide evidence of continuous residence in the UK, particularly between 2001 and 2008. The respondent concluded that taking into account all relevant matters, there are no exceptional circumstances that would warrant a grant of leave to remain in the UK outside the immigration rules.
3. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Row for reasons set out in a decision dated 22<sup>nd</sup> December 2021. At paragraph [5], Judge Row said; "*It was not argued that the*

*appellant could succeed within the rules*". At paragraph [9] of the decision, Judge Row referred to the grounds of appeal and said:

"Whilst it was accepted that the appellant had not been continuously resident in the United Kingdom for 20 years at the date of application, she now had been so resident. Although she had made no application under paragraph 276ADE(1)(iii), if she did, she would succeed. This should be taken into account in assessing the appellant's appeal on the basis of her private life."

4. At paragraph [11] Judge Row noted that the only ground on which the appeal could succeed is that the respondent's decision is a disproportionate interference with the right to respect for the appellant's family and private life protected by Article 8 ECHR. The judge's findings of fact and conclusions are set out at paragraphs [15] to [36] of the decision. Importantly, the judge said, at [15]:

"One of the reasons for refusal was that it was said that the appellant did not meet the suitability requirements of Appendix FM as she had given misleading information in her application. She had stated that she had sole responsibility for the children and that they lived with her rather than her husband. She had failed to mention that she was living with her husband who was subject to a deportation order. The appellant disputed that she had intended to mislead. The question of providing misleading information was only relevant to an application within the Rules. It is not argued that the appellant can succeed within the Rules. It is not necessary for me to consider this issue further."

5. At paragraph [16], Judge Row refers to the appellant's claim that she has lived in the UK continuously since 21<sup>st</sup> January 2021, albeit that is disputed by the respondent. At paragraphs [27] to [29] Judge Row said:

"27. All The appellant argues that she has been continuously resident in the United Kingdom since 2001. She says that although she has not made an application under paragraph 276ADE(1)(iii) she would succeed if she did. I do not accept that argument. She has not made an application. She may not do so. If her husband and son are deported she may seek to continue her family life in Zambia rather than pursue a right to remain in the United Kingdom.

28. In any event the decision maker did not accept that the appellant had been continuously resident in the United Kingdom since she arrived in 2001. The decision maker pointed to a gap between 2001 and 2008 where no evidence of continuous residence he had been provided.

29. If the appellant chooses to make an application under article 276ADE(1)(iii) she will have to make the application, pay the appropriate fee, and provide the appropriate evidence upon which the decision maker will make a decision. The decision maker is not bound to accept that the appellant has been continuously resident in the United Kingdom since 2001 simply because she says that she has. That argument does not weigh in the appellant's favour. It has a neutral effect."

6. The appellant claims Judge Row failed to conduct a holistic assessment of the appellant's Article 8 claim and failed to make a finding as to whether the appellant has established that she has lived continuously in the UK for at least 20 years. It is said that any assessment of the appellant's Article 8 claim must take into account the length of her residence in the UK, even if the appellant could not satisfy the requirement in paragraph 276ADE(1)(iii) of the immigration rules that at the date of application, the applicant had lived continuously in the UK for at least 20 years. A finding that the appellant had nevertheless lived continuously in the UK for at least 20 years as at the date of the hearing of her appeal, was a factor relevant to the assessment of proportionality.
7. Permission to appeal was granted by First-tier Tribunal Judge Cartin. Judge Cartin considered the judge's failure to make a finding as to whether the appellant had acquired 20 years continuous residence in the UK at the date of hearing, is arguably an error of law.
8. At the hearing before me, Mr Bates candidly accepts the decision of Judge Row is vitiated by a material error of law and must be set aside. He accepts that the fact that the appellant may have lived continuously in the UK for at least 20 years, was a factor that was relevant to an assessment of the Article 8 claim outside the immigration rules and relevant to the question whether the decision to refuse the appellant leave to remain is disproportionate. It remained a prerequisite that the judge would have to be satisfied that the application does not fall for refusal on suitability grounds, but Judge Row said at [15], that it was not necessary to consider that issue because it was not argued that the appellant can succeed within the rules. Mr Bates accepts Judge Row did

not complete the required assessment of the Article 8 claim either within or outside the immigration rules, and the decision should therefore be set aside.

9. Mr Wilson agrees with Mr Bates that it was incumbent upon Judge Row to carry out an assessment of the Article 8 claim outside the immigration rules, taking into account any finding made as to whether the application fell for refusal under the immigration rules on suitability grounds, and more importantly, on the basis of findings made as to the length of the appellant's residence in the UK. If the appellant is able to establish that as at the date of the hearing of her appeal, she met the requirements for leave to remain on private life grounds set out in paragraph 276ADE(1)(iii), that is a factor that weighs heavily in her favour and should have been considered in the assessment of proportionality.
10. In my judgment Mr Bates, rightly concedes the decision of Judge Row contains a material error of law and should be set aside. Even if the appellant could not establish that she met the requirements of the immigration rules at the date of application, if the judge was satisfied that she met the relevant requirements of paragraph 276ADE(1)(iii), as at the date of the hearing of the appeal, that was capable of having a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the Secretary of State to refuse his human rights claim is unlawful under section 6 of the Human Rights Act 1998. In order to make that assessment, it was incumbent upon the judge to make a finding as to the length of the appellant's continuous residence in the UK and whether her application fell for refusal on grounds of suitability set out in section S-LTR of Appendix FM.
11. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based

assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules. Although the appellants' ability to satisfy the Immigration Rules was not the question to be determined by Judge Row it was capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. Having heard the parties submissions as to the error of law, I informed the parties that I am satisfied the decision of Judge Row is vitiated by a material error of law and must be set aside.

12. As to disposal, I agree with the parties that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25<sup>th</sup> September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive. Given the issues that arise in this appeal regarding the appellant's length of residence in the UK and whether her application falls for refusal on grounds of suitability, the most appropriate course is for the decision to be set aside with no findings preserved.
13. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

### **Notice of Decision**

14. The appeal is allowed, and the decision of FtT Judge Row is set aside.
15. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings

Signed **V. Mandalia**

Date; 15<sup>th</sup> September 2022

## **Upper Tribunal Judge Mandalia**