Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00967/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 6 August 2014	**On 9 December 2014**

Before

UPPER TRIBUNAL JUDGE DEANS
DEPUTY JUDGE OF THE UPPER TRIBUNAL HOLMES

Between

MS ANNAH MAKONI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss K Smith of Counsel, instructed by Kirklees Law Centre
For the Respondent: Mr C Dewison, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Robson dismissing an appeal on asylum and human rights grounds.

2) The appellant was born on 4 April 1977 and is a national of Zimbabwe. She came to the UK as a visitor in February 1998. Her leave was extended as

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a student until 2002. In 2003 she sought leave to remain as the spouse of a settled person and when this application was rejected she applied as the spouse of an EEA national. She was granted leave in this capacity until 2005.

3) In 2005 her husband, who was a Portuguese national of Angolan origin, returned to Angola after the death of his father. He did not return to be with the appellant and it became clear by the end of 2006 that the marriage had broken down. A decree absolute was pronounced in January 2012.

4) In 2010 the appellant began a relationship with a man of Zimbabwean nationality, Tigere Maruta. The relationship continued until 2013 and the couple had 2 children together. Mr Maruta currently has no contact with the children and the appellant is unaware of his whereabouts. In 2010 the appellant made a human rights claim under Article 8 in 2010 but this was refused later that year. In July 2012 she attempted to make an application on the grounds of long residence. She sought to do this prior to a change in the Rules that would remove the possibility of claiming leave to remain after 14 years' residence. According to the appellant her solicitor did not accurately copy the number from her debit card onto the application form and as a result her application was rejected by the Home Office because of non-payment of the fee.

5) According to the appellant the only relatives she had left in Zimbabwe were her elderly parents. As a woman on her own she feared gender persecution and ill-treatment. She was concerned she would not be able to support herself and her children. She had attended some meetings in London in 2004-2005 organised by the MDC but she was not a member of any political party. She was sympathetic towards the policies of the MDC. Her ethnic origins were Shona.

Decision of the First-tier Tribunal

6) The Judge of the First-tier Tribunal found that the appellant's parents had been able to live quite safely and peacefully in Harare. The appellant had no political profile in Zimbabwe.

7) The judge accepted that there was widespread discrimination against women in Zimbabwe, particularly in rural areas, and sexual and gender-based violence was widespread. The judge noted, however, that the appellant had been self sufficient for a number of years. She was educated and spoke Shona. There was no reason why she could not ally herself to her family even if they could not financially support her. The judge did not accept that the appellant would have to live on the street in Zimbabwe and did not accept that her parents would not at least give her shelter. He noted that the appellant had obtained qualifications in the UK and had worked successfully for the City of Westminster. With her qualifications the judge was not satisfied that she would not find a job and

did not accept that her qualifications would not be transferable to Zimbabwe.

8) The judge found that the appellant did not have a claim to family life under the Immigration Rules but considered the application of paragraph 276ADE, as it was at the date of the hearing on 14 March 2014. The judge considered the decision of the Upper Tribunal in Ogundimu [2013] UKUT 00060 on the question of whether the appellant had "no ties with the country to which he would have to go if required to leave the United Kingdom." The judge noted that the appellant still had parents in Zimbabwe. Although she had been in the UK since 1998, she had spent the first 21 years of her life in Zimbabwe and would still have cultural ties with that country.

9) The judge accepted that the appellant's removal would be an interference with her private life sufficient to engage Article 8. The judge went on to consider the issue of proportionality. The judge took into account that the appellant has been in the UK for a significant period and has not been convicted or charged with any criminal offence during this period. She sought to regularise her position under the then 14 year rule and it was through no fault of her own that the opportunity to do this was lost. The evidence indicated that this was caused by an error made by her representative writing down the wrong debit card details on the application form. The judge noted that this was an unusual feature of the case which would be borne in mind. The judge also bore in mind that appellant had a previous opportunity of remaining in the UK by virtue of her marriage to an EEA citizen. There were, however, no exceptional, compassionate or compelling reasons to prevent the appellant from leaving the UK. Given the age of her children it would be in their best interests to accompany their mother to Zimbabwe.

Application for permission to appeal

10) An application for permission to appeal was made to the First-tier Tribunal stating that the judge did not properly consider private life under paragraph 276ADE and did not properly assess proportionality having regard to the relevant factors. The judge did not make findings upon relevant matters. Reference was made to Ogundimu at paragraph 125 in particular but it was said that the circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go included the length of time a person has spent in the country to which he would have to go if he were required to leave the UK; the age that the person left that country; the exposure that person has had to the cultural norms of that country; whether that person speaks the language of the country; the extent of the family and friends the person has in the country to which he is being removed; and the quality of the relationships that person has with those friends and family members.

11) It was contended that the judge had failed to take into account that the appellant had only her elderly parents in Zimbabwe and they would not be able to support her. Although she had spent 21 years in Zimbabwe she was studying and the ties that she created as a child and a young adult would not be the same as a person created as an adult. The country had undergone significant changes. The appellant's application under the 14 year rule was refused through no fault of hers. The judge should have made a finding as to whether the appellant would have succeeded in her application for leave on the basis of long residence had the incorrect card details not been submitted. The judge did not properly consider the opportunities the appellant had had to obtain leave to remain upon the completion of 10 years' lawful residence in 2008, when her EEA residence card expired, and again when she applied under the 14 years long residence rule.

12) Permission to appeal was refused by the First-tier Tribunal and the application was renewed to the Upper Tribunal. In this application it was contended that the judge gave inadequate reasons for finding that the appellant did not satisfy paragraph 276ADE; failed to make findings upon material matters, and failed to give proper scrutiny and weight to relevant factors in assessing proportionality. The grounds were similar if not identical to those out before the First-tier Tribunal. Permission to appeal was granted by the Upper Tribunal on 5 June 2014. In the decision granting permission it was stated that the judge's approach to Article 8 was arguably flawed and permission was granted on all grounds.

Hearing before the Upper Tribunal

13) At the hearing before us Miss Smith submitted that the reasoning under paragraph 276ADE given by the judge was not adequate. The appellant had not had contact with her parents since October 2013. The judge had not carried out a proper assessment of the relevant factors. The quality of the appellant's relationship with her parents was relevant, as were the other factors in Ogundimu.

14) In relation to proportionality Miss Smith argued that the judge had failed to make proper findings in respect of the application for indefinite leave to remain. In relation to the application made on the basis of 14 years' residence, however, it was pointed out that in a refusal decision of 10 September 2010 the appellant was notified that she would be subject to enforcement action if she did not leave the UK. Reference was made to the decision of the Court of Appeal in FH (Bangladesh) [2009] EWCA Civ at 385.

15) Miss Smith nevertheless argued that the appellant had 10 years lawful residence from 1998 until 2008. It was pointed out that there was a gap in this lawful residence from March 2002 until March 2003. This was apparent from the appellant's passport. Misss Smith then referred to Regulation 10(5) of the EEA Regulations. It was then pointed out that the

appellant's husband was not a qualified person at the date of the termination of the marriage, as required in terms of regulation 10(5), as he had left the UK in 2005.

16) Miss Smith submitted that the appellant had been in the UK for 16 years and this was a significant period. For a considerable period of this time she had been here lawfully. At paragraph 70 of the determination the judge had accepted that there were some facts in favour of the appellant but then concluded that there were no exceptional, compassionate or compelling reasons to prevent the appellant from leaving the UK. Miss Smith submitted that Gulshan [2013] UKUT 640 had been disapproved by the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 985. There was no need for an intermediate test under Article 8 of whether there were good arguable grounds for considering the application of Article 8 outside the Rules.

17) Miss Smith further submitted that the appellant came to the UK lawfully. She had remained here for 16 years. During this time she had maintained herself and had tried to remain lawfully. She had no convictions. She had sought to integrate into the UK. She had not been to Zimbabwe since 2003. She had no contact with her parents. She had two children, although they had no contact with their father. Ms Smith submitted that the judge did not properly carry out the proportionality exercise. The judge set out some factors and then said there were no exceptional, compassionate or compelling reasons.

18) Miss Smith further submitted that if there was an error in relation to proportionality, then further evidence should be heard in relation to the issue.

19) For the respondent, Mr Dewison submitted that all the facts were known. The judge was directed to Gulshan. This allowed consideration outside the Immigration Rules if there were good grounds for doing so. The judge considered all the factors and made no error.

20) Mr Dewison further submitted that if the appeal was reheard for the purpose of re-making the decision then the recently inserted sections 117A and B of the 2002 Act would have to be considered. He further submitted that the decision made in 2010 stopped the clock on the question of 14 years' residence under paragraph 276B of the Immigration Rules.

21) In response Miss Smith emphasised that the question for the Tribunal was whether the judge had properly understood the question of proportionality.

22) We reserved our determination subject to the qualification that if we found an error of law there would be a further hearing.

Discussion

23) We do not consider it was incumbent upon the Judge of the First-tier Tribunal to consider whether the 2012 application by the appellant for indefinite leave to remain on the basis of 14 years' long residence would have succeeded had there not been the unfortunate error over her debit card number. Had the applicant been accepted as valid, it would have to have been considered by the Secretary of State before any possibility of an appeal to the Tribunal and it was never substantively considered by the Secretary of State. We do not have to make a finding on whether the notice served on the appellant in 2010 would have constituted a notice of liability to removal but, if it did, the appellant's claim to long residence under 276B would not have succeeded. In this appeal, however, we are concerned with the facts and circumstances as they are and not as they might have been.

24) Miss Smith helpfully gave us a summary of the positive factors in favour of the appellant in the balancing exercise under Article 8. She pointed out that the appellant had arrived in the UK lawfully and tried to remain here lawfully. She had no convictions. She had maintained herself. She had sought to integrate into the UK in the course of residence here for 16 years. The absence of negative factors, such as criminal convictions, or failure to maintain oneself, or remaining illegally, carries much less weight in the balancing exercise, however, than positive factors.

25) The main positive factor in the favour of the appellant, in addition to her length of residence, was the position of her two children. The Judge of the First-tier Tribunal rightly had regard to their best interests, which would be to accompany their mother to Zimbabwe. We note that the older child was born in February 2012 and that the appellant was pregnant with the younger child at the time she split up with her partner in 2013. The judge properly took account of the ages of the children in relation to deciding their best interests.

26) The judge's finding that it was in the best interests of the children to accompany their mother to Zimbabwe was made on the basis, of course, that the mother and children would not be destitute and homeless. The judge found that the appellant would be able to find shelter with her parents in Harare even if they could not support her.

27) Before us it was submitted that the judge had failed to take into account the appellant's lack of contact with her parents. The judge recorded the evidence of the appellant that she had not spoken to her parents for a long time. Her parents moved house in October 2013 as they were unable to afford the rent in the Highfields area of Harare. The appellant learnt of the move from her sister, who lives in London.

28) The appellant's evidence was that she had not spoken to her parents since before they moved house, but this move took place only about six months

prior to the hearing. The appellant's parents had been in touch with her sister in London, with whom the appellant herself was in contact. Accordingly, the appellant had news of her parents. The judge was entitled to find on the evidence that her parents would at least be able to provide the appellant with shelter.

29) As far as supporting herself was concerned, the judge pointed out that the appellant had obtained qualifications in the UK and had worked successfully for the City of Westminster. The judge considered that her qualifications would be relevant in Zimbabwe and he was satisfied that she would be able to find work there. The judge pointed out that the appellant speaks Shona, which is one of the main languages in Zimbabwe. The appellant had lived in Zimbabwe for at least 20 years before coming to the UK. This is not a case where the appellant has lived in the UK since childhood, as in Ogundimu.

30) The findings upon which the balancing exercise was based were set out by the judge in paragraphs 54-61. Looking at paragraph 70 of the determination, we find it is difficult to identify any material factor which would have affected the outcome of the balancing exercise which the judge left out of account.

31) The question was raised of whether the judge properly directed himself as to the application of the proportionality test. Miss Smith suggested that in following the approach in Gulshan as to whether there were good arguable grounds for considering Article 8 outside the Rules the judge may have applied a requirement which was not considered necessary by the Court of Appeal in MM (Lebanon).

32) We note that having found the appellant would not succeed under the Immigration Rules, the judge proceeded to consider the appeal under Article 8 outside the Rules and to address the questions set out in Razgar [2004] UKHL 27. The test in Gulshan did not prevent the Appellant from following this course.

33) Miss Smith raised a further issue, however, relating to the use by the judge of the phrase "exceptional compassionate or compelling reasons" at paragraph 70 of the determination. In this regard we note that the Immigration Rules introduced in July 2012, and as subsequently amended, are intended to reflect previous domestic and Strasbourg jurisprudence on Article 8 and, although they are intended to be comprehensive, there may still be cases falling outside the Rules in which the removal of an individual will amount to a disproportionate interference with her Article 8 rights. Although in Gulshan the Upper Tribunal referred to arguments about "exceptional" circumstances, the phraseology used by the Tribunal in its conclusions on whether an appeal should succeed under Article 8 was whether there were compelling circumstances not sufficiently recognised by the Rules and whether removal would be "unjustifiably harsh".

34) In the present appeal the judge weighed the public interest in effective immigration control against the appellant's right to private life in the UK, taking account of the factors which demonstrated the establishment and strength of her private life, together with that of her children. The factors which were considered in the balancing exercise and the reasoning which was given are sufficient to show that the judge properly carried out the balancing exercise and reached a sustainable conclusion. We see nothing in the judge's approach to the test of proportionality which runs contrary to the decision of the Court of Appeal in MM (Lebanon), having particular regard to the analysis of the case of Shahzad [2014] UKUT 85 at paragraph 132. We find no error of law in the judge's conduct of the balancing exercise and assessment of proportionality under Article 8.

35) The remaining aspect of this appeal concerns the judge's consideration of paragraph 276ADE and the question of whether the appellant has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK. We note that the relevant wording of this provision has altered since the hearing but in order to assess whether the judge made an error of law, we would look at the wording as it was at that time.

36) The appellant's position is that the judge did not have proper regard to the case of Ogundimu, which the judge referred to at paragraph 63 of the determination. The judge found that the appellant's parents were in Zimbabwe and although she has been in the UK since 1998 she did not leave Zimbabwe until she was 21 years old and would, in the view of the judge, "inevitably have cultural ties with that country."

37) This reasoning is brief. We have already commented on the position of the appellant's parents and have found that the judge was entitled to take their presence in Zimbabwe into account, notwithstanding that the appellant personally had had little contact with them in recent months. Similarly, the judge was entitled to take into account the length of time for which the appellant had lived in Zimbabwe, which included all of her childhood and teenage years. The judge had previously made a finding about the appellant's ability to speak Shona. On the evidence the judge was entitled to find that the appellant still had ties with Zimbabwe.

38) We are satisfied that the judge made findings upon the relevant factors both in relation to paragraph 276ADE and in relation to Article 8 outside the Immigration Rules. Although the judge's reasoning is brief, the reasons are adequate to support the findings made and the conclusions reached.

Conclusions

39) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

40) We do not set aside the decision.

Anonymity

41) The First-tier Tribunal did not make an order for anonymity and we do not consider such an order to be necessary.

Signed Date **8 December 2014**

Upper Tribunal Judge Deans