Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/13766/2014
IA/13767/2014
IA/13768/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
On 10 September 2014	**On 30 September 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN
UPPER TRIBUNAL JUDGE DAWSON

Between

CHILUNGA CHIZEMA
MUMBA CHIZEMA
FUNGAI CHIZEMA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellants: Mr D Byrne, instructed by McGill & Co., Solicitors
For the Respondent: Mrs M O'Brien, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellants, a brother and two sisters, are citizens of Zimbabwe now aged 31, 32 and 36, who arrived in the UK on visit visas on different occasions between 2001 and 2002. They appeal to the Upper Tribunal

against a determination by First-tier Tribunal Judge J C Grant-Hutchison, promulgated on 29 May 2014, dismissing their appeals against refusal of applications made on 5 October 2009 on the basis of their private life in the UK.

2. The essence of the grounds is as follows :

> The Judge afforded inadequate weight to the substantial period of residence in the UK shown by the appellants. Each came to the UK when teenagers and now are … in their 30's.
>
> … the length of residence and the transition to adulthood results in removal having a greater impact with respect to psychological and moral integrity and identity under Article 8 ECHR … there has not been adequate consideration of the appellants' developed identities …

3. On 17 June 2014 First-tier Tribunal Judge Gibb granted permission to appeal to the Upper Tribunal. Although this aspect was not raised in the grounds, he thought that the judge focused on paragraph 276ADE of the Rules, but these were applications made long before 9 July 2012. That provision was therefore not applicable on the authority of *Edgehill v SSHD* [2014] EWCA Civ 402 and this arguably led to proportionality being assessed on a wrong footing. He also considered that the judge arguably erred in relation to *EB (Kosovo) v SSHD* [2008] UKHL 41 in regarding the respondent's delay of 4 and half years as not reducing the weight to be given to immigration control.

4. The first appellant arrived here with a visit visa in June 2002 and remained without leave on its expiry. On 5 October 2009 he applied for his case to be considered under Article 8 of the Human Rights Convention. Mumba, the second appellant, also entered the United Kingdom on a visit visa. She then made a successful in-time application for leave to remain as a student and was granted successive periods of leave until 31 August 2006. She too made application on 5 October 2009 for consideration of her case on Article 8 grounds. Fungai, the third appellant also entered on a visit visa in December 2001 and she too was granted leave to remain as a student but only until 23 October 2002. She too joined the applications made on 5 October 2009 based on her private life.

5. The respondent rejected the applications for reasons given in a single letter dated 4 March 2014 and on the same date gave notice of her decisions to remove the appellants pursuant to s.10.

6. The accompanying reasons letter explains that the circumstances of the appellants were considered with reference to Appendix FM and paragraph 276ADE. There was also a separate Article 8 consideration, however it was concluded that there were insufficient factors to justify the appellants remaining outside the Rules. In reaching this conclusion the Secretary of State accepted that:

(i) None of the appellants is known to have a criminal record.

(ii) The appellants have remained beyond their respective periods of leave to remain.

(iii) The applications have been outstanding since October 2009.

7. In a detailed determination, the judge set out the evidence before her regarding the circumstances of each appellant and reached these findings:

(i) The appellants' parents live in Zimbabwe and they are in contact with them.

(ii) Each had left Zimbabwe when an adult and lived together in the United Kingdom as they had done in Zimbabwe.

(iii) It was not accepted the appellants did not have cultural or social ties to Zimbabwe.

(iv) The appellants did not meet the requirements of paragraph 276ADE (vi).

8. The judge then turned her attention to Article 8. After directing herself in accordance with *R (Nagre) v SSHD* [2013] EWHC 720 (Admin) and *Gulshan (Article 8 – new rules – correct approach)* [2013] UKUT 640 (IAC) she concluded that:

> "After applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

9. She considered this approach was confirmed in the petition of *MS v SSHD* [2013] CSIH 52 p1053/12. The judge then proceeded with a freestanding Article 8 assessment and after directing herself as to the familiar *Razgar* steps, proceeded to make her findings on the proportionality of the interference that she considered would arise in the event of removal to the Secretary of State's aim of maintaining immigration control. The circumstances of each of the appellants were then analysed. The judge chronicled their activities here since arrival and the connections that they had established. She thereafter made her findings in terms that:

(i) Simply because the appellants have not been able to keep in contact with their parents did not mean to say that they did not care, having regard to the assistance their father's friends in the United Kingdom had provided.

(ii) It was noted that the appellants have been described as hardworking and that as a result they will prosper. There was no reason why they would not find work in Zimbabwe. The second and third appellants have qualifications.

(iv) There was no reason why the financial assistance that the appellants had been receiving could not continue at least in the short term until

they have re-established themselves in Zimbabwe. The appellants' mutual support could also continue there.

(v) There was no obligation on the United Kingdom to provide the appellants with career opportunities and a better economic outlook than they would have in Zimbabwe.

(vi) After expressing doubts about the evidence of the role of Mr Brett in Mumba's life, the judge was not convinced that the parties were as established in their relationship as made out. Even if she were wrong and they do have a genuine relationship, there was no reason why Mumba could not make a proper application from Zimbabwe to return as his partner.

(vii) There was nothing in the relationships between Chilunga and Fungai and Mr Brett beyond their common relationship to Mumba.

10. Finally the judge turned to the issue of delay. The argument before her was that there had been excessive delay in processing the application that had raised the appellants' expectations especially after reminders had been sent. She directed herself in accordance with *EB (Kosovo) v SSHD* [2008] UKHL 41 and concluded that the appellants had not been disadvantaged by the delay. She did not accept in the circumstances of the case that there had been prolonged and inexcusable delay which would reduce the weight normally given to the need for firm, fair and consistent immigration control.

11. We return to the grounds of challenge. Those on which permission to appeal was sought do not raise anything of substance. Despite what is asserted the judge gave weight to the length of residence in her comprehensive reasons for concluding that interference with the private lives of the appellants was proportionate. There is no basis on which it can be argued that there had been an inadequate consideration of the appellants' circumstances taking account of this carefully considered determination.

12. We turn to the additional points raised by Judge Gibb in granting permission, on which we are grateful to Mr Byrne for his argument. We do not consider however that *Edgehill* has a material bearing on this case. The question addressed by Jackson LJ at part 3 of his judgment was as follows:

> "Is it lawful to reject an Article 8 application made before 9 July 2012 in reliance upon the applicant's failure to achieve twenty years' residence, as specified in the new Rules?"

13. He clearly explains at [33]:

> "Accordingly, my answer to the question posed in this part of the judgment is 'no'. That answer is subject to one important qualification. A mere passing reference to the twenty years' requirement of the new Rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful

> if the decision maker relies upon Rule 276ADE(iii) as a consideration materially affecting their decision."

14. Jackson LJ then applied this principle to the decisions in the individual cases. As to the first appellant his view was that the Upper Tribunal fell into error in treating the requirement of twenty years in the new rule as a relevant consideration. Had the Upper Tribunal not made that error it was far from clear it would have reached the same decision and thus the case was remitted for reconsideration.

15. The second appellant was less successful. Unlike the first appellant he had not achieved fourteen years. She had lived here for eight years when she made her application and nine years five months when the Upper Tribunal made its decision. He observed:

> "... it is clear that both the Secretary of State and the Tribunals would have made precisely the same decision whether or not they had regard to the new Rules."

16. In our view Judge Grant-Hutchison was correct to consider the appellants' cases under the new Rules; there would have had no complaint had it been established that the appellants could succeed under these provisions. She then correctly proceeded to examine the circumstances on a freestanding Article 8 basis. It is clear to us from her reasoning that she found they could not succeed on Article 8 grounds *not* because they had not been here for twenty years but because she considered the interference that would arise would be proportionate. She took proper account of how the appellants had spent their time in the United Kingdom, their periods of lawful and unlawful residence and also the circumstances they would encounter on return.

17. Accordingly we are not persuaded that the proportionality assessment was conducted on an incorrect footing.

18. The final additional point raised by Judge Gibb relates to the delay. We consider that the judge correctly addressed herself as to the principle she was required to apply and reached a conclusion rationally open to her on the evidence.

19. We conclude that the judge made findings open to her on the evidence correctly directed herself as to the principles she was required to apply and reached a permissible conclusion on proportionality without legal error.

Signed Date 30 September 2014

Upper Tribunal Judge Dawson