Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43529/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 19th September 2014	**On 26th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MUTSVENE DARLINGTON CHIKONO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Shenaz Ahmad (Solicitor)
For the Respondent: Mr Richards (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Obhi promulgated on 21st May 2014, following a hearing at Sheldon Court on 9th May 2014. In the determination, the judge allowed the appeal of

Mutsvene Darlington Chikono. The respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Zimbabwe, who was born on 27th May 1973. He appeals against the decision of the Respondent Secretary of State dismissing his application for further leave to remain under Article 8 of the ECHR, following the grant previously of discretionary leave to remain, in a decision dated 8th October 2013.

The Appellant's Claim

3. The Appellant's claim is that he has been in the UK since 1997. The Secretary of State has removed him on two separate occasions. He has returned within days of being removed. However, he has established a private and family life with his wife, Mrs Vongai Gondo Chikono, and his son, Darren Muneshe Giles Chikono, who is presently aged 15 years. Both of these family members are British citizens and settled in the UK.

The Judge's Findings

4. The judge held that the Appellant, notwithstanding his illegal entry on two occasions at least, "had been frank in his evidence and it was accepted that he had been removed twice and returned, but he had waited a long time to make any application …" (paragraph 12). The Presenting Officer did not refute the evidence that the Appellant had been in the UK since 1997. The Appellant's own case was that he had been here for seventeen years. The Home Office did not have records.

5. The judge heard evidence from the Appellant's wife and found her to be "a largely credible witness" who was aware of the Appellant's removal on two occasions (paragraph 14). However, the judge had regard to the fact that both the Appellant's wife and son were British citizens and settled in the UK. She held that it was unlikely that the Appellant's wife would go to Zimbabwe with the Appellant (paragraph 18). The appeal was allowed on the basis of Article 8 considerations.

Grounds of Application

6. The grounds of application state that the judge had committed a material error of law in that, in considering Article 8 of the ECHR, she had failed to have regard to the case of **Gulshan [2013] UKUT 640**. This case required a judge to justify by way of reasons a departure from the Immigration Rules.

7. On 25th June 2014, permission to appeal was granted.

Submissions

8. At the hearing before me on 19th September 2014, Mr Richards, appearing on behalf of the Respondent Secretary of State, submitted that the judge had erred in not making any reference to **Gulshan**, although he would have to accept that at paragraph 16 she does give consideration to the essence of what appears in **Gulshan**, pointing out that the Immigration Rules are a complete code. However, even if one accepts that she had had poor consideration to the factors in **Gulshan**, she had proceeded then to engage in freewheeling Article 8 proportionality exercise. This was not open to her. I should make a finding of an error of law and set aside the decision.

9. For her part, Mrs Ahmad submitted that the judge had given a comprehensive determination. The Appellant's criminal convictions had been taken into account. They were only driving offences and the convictions had been spent. She would to accept that **Gulshan** was not mentioned, but the outcome would have been the same, because of the impact of the Appellant's removal on his wife and son, Darren, who was now at the impressionable age of 15 years. In **Gulshan** itself, the judge had referred (at paragraph 13) to the fact that there was a vast amount of Article 8 case law now and there should be no further reason to add to this case law, which meant that one should not pedantically refer to cases, just for the sake of doing so.

10. There was no further reply from Mr Richards.

No Error of Law

11. I am satisfied that the making of the decision that the judge did not involve the making of an error on a point of law see (Section 12(1) of TCEA 2007) such that I should set aside this decision. The judge does in terms refer to **Gulshan**, but that is neither here nor there, when it is recognised that at paragraph 16 of the determination, the judge begins her consideration of Article 8 by an explicit reference to the fact that the Rules are effectively a complete code. She follows that up with the statement that,

> "The only basis upon which I can go beyond the Rules and carry out a balancing exercise to assess whether the impact on the Appellant of his failure to meet the requirements creates disproportionate interference to his private and family life is if I find that there are compelling circumstances which require me to go beyond the Rules" (paragraph 16).

12. Nothing could be clearer than this. The judge looked for "compelling circumstances". This was after having found that the Appellant had been involved in the care of his son and that it was "in Darren's best interest to

have his father around", and that "He is at a crucial stage of his development …" (paragraph 15).

13. In the consideration of "compelling circumstances" the judge then adverted to the fact that the removal of the Appellant (who has an undisputed quality of being able to re-enter the UK at will despite repeated and determined efforts at removal by the UK state) would be "depriving him [the Appellant] of his fundamental right to live with his family" in a way that was disproportionate (paragraph 18).

14. This was despite the judge's clear finding that, "I have little sympathy with the Appellant". However, regard had to be given to the fact that the Appellant's wife was legally settled and that she now had British citizenship. Importantly, the judge held that, "It is unlikely that she will go to Zimbabwe". In addition, the judge weighed in the balance the fact that "The removal of the Appellant will impact of Darren in a manner which in the long run will not serve his best interest" as a teenage boy (paragraph 18).

15. It was after these findings of fact that the judge then applied the **Razgar** principles on proportionality (paragraph 19), and found herself coming on the side of the balance of considerations being in favour of the Appellant. This was a matter that the judge was entitled to decide as she did, given that she had followed through with care the basic principles as apply to Article 8 determinations. Another judge may well have taken a different view.

16. However, it cannot said, in view of the clear findings in relation to the status of the Appellant's wife and son, and the need for the son to have his father around in the UK, that the decision is unreasonable.

Decision

17. There is no material error of law in the judge's decision. The determination shall stand.

18. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 26th September 2014