UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) APPEAL NUMBER: HU/01472/2015

THE IMMIGRATION ACTS

Heard at: Field House
On: 17 May 2017

Decision and Reasons Promulgated
On: 7 June 2017

Before

Deputy Upper Tribunal Judge Mailer

Between

MS JACKY THANDO AHOBELE
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr R Singer, counsel, instructed by Paul John & Co Solicitors
For the Respondent: Mr K Norton, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of South Africa, born on 10 December 1975. Her appeal against the respondent's decision dated 18 June 2015 to refuse to grant her leave to remain on human rights grounds was dismissed by the First-tier Tribunal in a decision promulgated on 27 October 2016.

2. The appellant appeals with permission from First-tier Tribunal Judge Saffer who found that it was arguable that the Judge materially erred '...in making an assumption as to the appellant's husband not being entitled to British nationality'. Although the Judge cannot

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be criticised for not considering documentary evidence not placed before her, she made an assumption on oral evidence that was manifestly wrong. This fact alters the legal matrix that needed to be considered.

<u>The appeal before the First-tier Tribunal</u>

3. The background to the appeal was summarised by the First-tier Judge. The appellant entered the UK in April 2002 as a visitor. She submitted an application for a student visa which was refused as no fee was paid. In March 2004 she submitted a further application for a student visa which was granted until 28 February 2005.

4. Subsequent applications to extend her student visa were refused. On 12 January 2012 she submitted an application for leave to remain outside the Rules on compassionate grounds. There was no right of appeal. On 17 February 2014 she was served with an IS 151A notice as an overstayer.

5. An application for leave to remain under the family and private life ten year route was refused, as well as certified on 10 March 2015.

6. Her subsequent application for leave to remain made on 8 April 2015, and which was the subject matter of the appeal, was refused on 8 June 2015.

7. The appellant stated before the First-tier Tribunal that she met her partner, Mr Moyo, in June 2012. He was enlisted in the British Army. They started a relationship and began living together as a couple that same year. She moved in to his home in London, SE18.

8. Her partner has been in the Army since 2011 and on account of his work cannot relocate to South Africa.

9. The flat where they live was purchased in both names. She received a single adult occupancy discount in respect of her council tax bill for 2014/2015 as she lived alone whilst her partner was abroad on a tour of duty.

10. The appellant said that she has lived in the UK for 14 years and has no family left in South Africa.

11. Her partner, Mr Moyo, also attended the hearing and gave evidence. He confirmed their relationship. The Judge noted that he adopted his witness statement - [21].

12. Mr Moyo stated that he had been enlisted in the Army in 2011 for 22 years. He expected to make the British Army his lifetime career. If the appellant were returned to South Africa he would not be able to leave his job in the army to go with her and if he remains in the army they will only allow him a limited time to spend with her there.

13. In her "consideration and findings" the Judge referred to Appendix FM of the Immigration Rules. This would only allow the appellant to be considered on the basis of her family life if she were seeking to enter or remain in the UK on the basis of her family life with a person who is a British citizen, settled here or with limited leave as a refugee or a person granted humanitarian protection.

14. She stated at paragraph [30] that Mr Moyo is a national of South Africa and when he enlisted in the British Army in 2011 he would have been granted leave to remain which would continue as long as he remained enlisted. She "believed" that after five years he would have the right to apply for naturalisation. As at today's date, Mr Moyo remained a South African national with limited leave to remain in the UK.

15. In the light of his immigration status, the Judge found that the appellant did not have a relationship with a person who is a British citizen, settled in the UK or with limited leave as a refugee or a person granted humanitarian protection. Accordingly the appellant could not succeed under the Immigration Rules in relation to a claim to family life [31].

16. She also found that the appellant cannot meet the relationship requirements as Mr Moyo does not meet the definition of a partner. Neither she nor Mr Moyo were consistent about the dates they started living together. She therefore placed no weight on their oral evidence regarding their claim of having lived together for two years. They therefore cannot meet the relationship requirements of FM – [34].

17. The Judge referred to paragraph 276ADE of the Rules. She concluded that the appellant would find little difficulty in re-integrating in South Africa. She could not meet the requirements under that paragraph.

18. She also considered the appellant's Article 8 rights under the Human Rights Convention – [41]. She was prepared to accept that they are in a subsisting relationship [46]. There is family life between them. This would be interfered with if she were required to leave the UK.

19. She considered whether the respondent's decision was proportionate. She referred to s.117B of the 2002 Act. The appellant and her partner entered into the relationship at a time when she was here illegally. In the circumstances she gave little weight to the relationship. She accepted that the partner is in the British Army and has been enlisted for 22 years. That meant that he cannot leave the UK at will. Those factors have to be balanced against the fact that when they started the relationship they both knew of her immigration status and that she was an overstayer.

20. Even though she accepted that it may not be reasonable to expect Mr Moyo to return to South Africa now, she did not find that it would be disproportionate for the appellant to return there to make an application for entry clearance. Separation is likely to be for a

few months and by the time she is missed she will be back in the UK. There will therefore be no severance of their family life which they could continue during the brief separation by letter, telephone, internet contact and even a short visit [54].

21. She had regard to the decision of R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 001 in which the Tribunal held that it would be for the individual to provide evidence that such temporary separation will interfere disproportionately with the protected rights. She found that the appellant provided no such evidence that her return would be for a short period.

22. With regard to her private life with her friends, she can keep in touch through emails and telephone calls.

23. In the circumstances, the Judge found that the appellant had failed to produce sufficient evidence that there are compelling circumstances rendering her removal disproportionate [55-57].

The appeal

24. In her grounds of appeal the appellant stated that the Judge "blatantly failed" to recognise and accept that her partner, Mr Moyo, is a British citizen. The decision was therefore made on a false assumption.

25. Mr Singer, who did not represent the appellant at the hearing submitted that there had been a fundamental error of law. As at the date of hearing before the First-tier Tribunal on 11 October 2016, Mr Mayo was in fact a British citizen. A copy of his British passport confirming that he is a British citizen was issued to him on 2 June 2015.

26. Moreover, Mr Moyo expressly stated in his witness statement before the First-tier Tribunal at page 5 of the appellant's bundle that he is a British national.

27. Accordingly, it was not correct that his passport had only now been produced, identifying that he became a British national in 2011. It was not correct that evidence of his British citizenship had not been placed before the Judge.

28. In the circumstances the Judge failed to give anxious scrutiny to the evidence. He submitted that as at the date of hearing, they had lived together for two years. Moreover, her partner is British. In the circumstances there are compelling circumstances. If Appendix FM was now considered she would most likely succeed in an application.

29. On behalf of the respondent, Mr Norton submitted that the appellant made her application on 8 April 2015. Mr Mayo's passport was only issued in June 2015. Moreover, the Judge also considered the appeal on an alternative basis [32]. She found that they had not been living together in a relationship akin to marriage for two years. The

respondent had not accepted that he met the definition of partner as defined in GEN.1.2 - reasons for refusal paragraph 12.

30. The Judge did consider whether there were compelling circumstances rendering her removal disproportionate [57]. She took into account the Article 8 rights of Mr Moyo. She also accepted that he is enlisted and cannot just leave the UK at will. Those factors were balanced against the fact that when the relationship commenced they were aware of the appellant's immigration status as an overstayer [53].

31. The Judge was prepared to accept that it may not be reasonable to expect her partner to return to South Africa now. However, it would not be disproportionate for her to return to make an application for entry clearance.

32. Mr Norton submitted that in the circumstances, any error made would not have been material. The Judge was entitled to find that there were no compelling circumstances in the appellant's case.

33. Mr Norton accepted that Mr Moyo produced his P60 for the tax year to 5 April 2014 showing that he earned a total of £21,543.77. However, having regard to the poor immigration history of the appellant, the temporary separation envisaged was not disproportionate.

34. In reply Mr Singer submitted that the appellant does currently meet the Rules. Accordingly there are compelling circumstances outside the Rules.

35. He submitted that the appeal should be remitted to the First-tier Tribunal for a fresh decision to be made.

<u>Assessment</u>

36. In addition to the submissions at the hearing, I have had regard to the skeleton argument before the First-tier Tribunal in which the appellant contended that there were insurmountable obstacles which existed under EX.1.

37. At paragraph 12 of the skeleton, counsel who represented the appellant submitted that this was not a case like <u>Chen</u>, supra, where "nationality is the only factor being pointed to by the claimant."

38. The Judge was referred to the decision in <u>Mirza (AP) v SSHD</u> [2015] Scot CS 28. The Court made observations regarding the test of insurmountable obstacles - EX.1. The court held that it is clear that the author of the November letter proceeded entirely on the basis that the petitioner's wife should go with him to live in Pakistan. That approach ignores the fact of the partner's British citizenship. It failed to consider the refusal of leave may result in the indefinite separation of the married couple and whether such

separation can be justified as a proportionate interference with their fundamental right to cohabit as a married couple.

39. The Court held that a disproportionate decision or measure in this field is not to be equiperated with the existence of an "insurmountable obstacle." That is a phrase that has been used by the European Court of Human Rights as indicating a factor which might be taken into account in judging whether a decision is disproportionate.

40. Mr Mayo produced a witness statement at the hearing where he stated at its outset that he is a British national. He further stated at paragraph 15 of his statement that he did not relish the idea of leaving a country of which he is a citizen. He will lose his privileges as a citizen. He contended that there were insurmountable obstacles.

41. That evidence was not challenged. Indeed, at paragraph 4 on page 1 of the reasons for refusal, the respondent herself refers to Mr Moyo now being a British citizen.

42. I find that the Judge's findings at paragraphs [29] to [30] where she incorrectly assumed that he did not have British citizenship, amounts to an error on a point of law.

43. I do not find that it is inevitable that the same decision would have been reached had the Judge properly taken into account the fact of Mr Moyo's British citizenship as at the date of application. During his submissions, Mr Singer submitted that this is an appropriate case to be remitted to the First-tier Tribunal for a fresh decision to be made. Mr Norton did not contend otherwise. I find, having regard to the Senior President's Guidelines in this respect, that this is an appropriate case to be remitted. There will be substantial fact finding involved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law. I set aside the decision and remit the appeal to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made before another Judge.

No anonymity direction is made.

Signed Date: 5 June 2017

Deputy Upper Tribunal Judge C R Mailer