



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001311
First-tier Tribunal No:
PA/50033/2021
IA/02104/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ALICE SHIMIKA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Naeem, Solicitor from Longfellow Solicitors
For the Respondent: Ms A Everett, Senior Presenting Officer

Heard at Field House on 25 March 2024

RE-MAKING DECISION AND REASONS

Introduction

1. This is the re-making decision in the appellant's appeal against the respondent's refusal of her human rights claim. The claim was made through further representations dated 25 September 2017 and the refusal thereof is dated 9 November 2020.

2. The appellant is a national of Zimbabwe, born in 1980. It is accepted that she entered the United Kingdom with leave on 23 October 2002. She obtained extensions of leave as a student up until 31 August 2007. She then overstayed. An asylum claim was made in April 2009 and this was refused in August of that year. A subsequent appeal was refused in December 2009. Nothing was seemingly done by the appellant (or indeed the respondent) between then and the making of the further representations in September 2017. The respondent's 2020 refusal relates to those further representations.
3. The appellant appealed against the respondent's refusal of her human rights claim. That appeal was dismissed by the First-tier Tribunal in a decision promulgated on 7 October 2021. The appellant challenged that decision and, by a decision promulgated on 31 March 2022, a panel of the Upper Tribunal (Upper Tribunal Judge Blum and Deputy Upper Tribunal Judge Grimes) concluded that the judge had materially erred in law and that his decision should be set aside.
4. The panel agreed with the respondent's concession at the error of law hearing to the effect that the judge had failed to adequately address the best interests of the appellant's child, a British citizen, and whether it would have been reasonable for that child to have left the United Kingdom, with reference to section 117B(6) NIAA 2002: [3]-[7]. The panel also concluded that there was no error by the judge in respect of his rejection of the protection claim. Indeed, the appellant's representative had withdrawn the challenge to the aspect of the judge's decision at the error of law hearing: [6]. Therefore, the sole basis on which the re-making was to take place was in relation to Article 8: [8]. The appeal was retained in the Upper Tribunal for a resumed hearing in due course.
5. The appeal was then listed before me on 5 May 2023. Unfortunately, the appellant's representatives had failed to provide any additional evidence

and I was not satisfied that I had sufficient information on which to make a fair and comprehensive re-making decision. The hearing was adjourned with directions.

The issues

6. At the outset of the resumed hearing on 25 March 2024 I sought to clarify and confirm the issues with which I was now concerned in this appeal. Both representatives helpfully obliged.

7. The sole overarching issue for me to determine is whether the appellant's removal from the United Kingdom would breach her Article 8 rights, both in relation to private and family life.

8. In respect of the appellant's private life (Issue 1), she relies on the assertion that she has lived continuously in United Kingdom for over 20 years and that this would render her removal disproportionate. She asserts that she falls within Appendix Private Life to the Immigration Rules ("Appendix PL") and that the appeal should be allowed with reference to TZ (Pakistan) v SSHD [2018] EWCA Civ 1109.

9. Ms Everett submitted that this issue constituted a "new matter" under section 85(5) NIAA 2002. I informed the parties that I agreed with that position, having regard to the relevant case-law of the Upper Tribunal: for example, Mahmud (S.85 NIAA 2002 - 'new matter') Iran [2017] UKUT 488 (IAC).

10. Having considered the respondent's position, Ms Everett proceeded to give consent for me to consider the 20 years' residence issue in this appeal. That consent did not extend to a concession as to the fact of the claimed continuous residence. I will address that particular issue later on.

11. Ms Everett did, however, confirm that the only period of residence which remained in dispute was between 2009 and 2015. In view of the evidence as a whole, that position was entirely fair and appropriate.
12. In respect of family life (Issue 2), it is common ground that the appellant is in a subsisting and genuine relationship with a naturalised British citizen, Mr Richard Shoniwa. They have undertaken a religious ceremony, although they are not married according to law. The couple now have two British citizen children: the first was born in August 2021, and the second in July 2023. In light of this, the core legislative provision to be considered is section 117B(6) NIAA 2002.
13. The representatives were agreed that the appellant's appeal could be allowed on one or other of the two elements of Article 8 relied on.

The evidence

14. I have before me the following evidence: the appellant's First-tier Tribunal bundle; the respondent's First-tier Tribunal bundle; a supplementary appellant's bundle provided at the error of law stage, indexed and paginated 1-31; a second supplementary appellant's bundle, indexed (but not paginated). This runs to 46 pages and includes only bank statements; and a final appellant's bundle, indexed and paginated 1-76 and filed and served on 24 May 2023.
15. The appellant and Mr Shoniwa attended the hearing and both gave oral evidence. I will deal with relevant aspects of this when setting out my findings and conclusions, below. Suffice it to say that they both adopted their 2023 witness statements and then answered questions about, amongst other matters, their respective ties to Zimbabwe. In particular, Mr Shoniwa provided details about his children from his previous marriage (one minor daughter and two adult sons) and his current familial ties to Zimbabwe. He confirmed that, by virtue of a family

trust, he and other family members had a property in the Cranbourne district of Harare. One of his adult sons had lived there for most of his life, although he was due to come to the United Kingdom imminently, and his daughter had resided there for a period of approximately six months and 2023.

16. During the course of that evidence, Ms Everett (in accordance with her customary fair approach to all cases in which she is involved) confirmed that she had been able to access certain GCID notes relating to the appellant's contact with the respondent over the course of the contentious period of 2009 to 2015. She confirmed that she could see three potentially relevant entries in the notes: the first from 2009, confirming that the appellant would be reporting at Eaton House reporting centre; the second from October 2015, confirming that a section 120 notice had been provided to the appellant on reporting; the third from October 2018, confirming that the consideration of the appellant's case had moved to a unit dealing with further submissions and that the appellant's representations had been outstanding since 2017.

17. I asked Mr Naeem whether he had any objection to this information being admitted as evidence. He confirmed that he did not. It was appropriate to admit this information, albeit that it had been provided through Ms Everett. There was no reason whatsoever to doubt the accuracy of that information and, in my view, it was relevant to the question of the appellant's residence in this country.

The parties' submissions

18. Ms Everett first addressed the question of private life. She acknowledged that there appeared to be relatively powerful evidence in favour of the appellant's claimed continuous residence in the United Kingdom since October 2002. Ms Everett submitted that whilst aspects of

the appellant's evidence relating to ties to Zimbabwe were not credible, this would not have an adverse impact in respect of her evidence relating to residence in the United Kingdom.

19. For the purposes of this appeal, Ms Everett agreed that Appendix PL1.3(c) appeared to show that the requirement for an individual to make a private life application in a prescribed manner was waived when the issue of long residence was raised during the course of an appeal, as was the case here. Thus, there was no procedural bar to the appellant succeeding under Appendix PL.

20. Ms Everett submitted that the oral evidence from Mr Shoniwa was significant. It demonstrated that he at least had significant ties to Zimbabwe with reference to family members and a property in that country. He had taken parental decisions for two of his children from his previous relationship to live in Zimbabwe for periods of time. There were family members there. In all the circumstances, Ms Everett submitted that it would be reasonable for the appellant's two very young children to go and live in Zimbabwe with their parents on a permanent basis.

21. Mr Naeem relied on the two aspects of Article 8. He submitted that the appellant herself had no real ties to Zimbabwe, even if Mr Shoniwa did.

22. At the end of the hearing I reserved my decision.

Findings and conclusions

23. I have considered all of the relevant evidence with care before making my findings and reaching my conclusions on the two core issues in this appeal.

Issue 1: private life

24. It is common ground that the appellant arrived in United Kingdom on 23 October 2002. It is also accepted that she resided continuously in this country from that point in time until 2009. This was the point at which her first appeal was considered and dismissed. It is accepted that the appellant has been continuously resident in this country from 2015 until the present day.
25. In light of the above I find as a fact that the appellant was continuously resident in the United Kingdom between 23 October 2002 and, for the sake of argument, the end of 2009 (the appellant had clearly been in this country during that appellate process which ended in December of that year). I also find as a fact that she has been continuously resident in this country between, again for the sake of argument, early 2015 to date.
26. The appellant's own evidence concerning the disputed period of 2009 to 2015 is clear enough. She is adamant that she resided in this country continuously. I take into account my finding that she has been less than candid about the overall ties to Zimbabwe (with specific reference to those of Mr Shoniwa), in respect of which I will return later. Having said that, I also take account Ms Everett's submission that this point would not have an adverse impact on the evidence relating to residence here.
27. There is no evidence before me to indicate that the appellant ever left United Kingdom during the period in question.
28. I regard the information provided by Ms Everett during the hearing as reliable. When taken with the evidence as a whole, this information demonstrates the following. First, the appellant was placed on reporting conditions in 2009. Secondly, that she was reporting in October 2015 when she was served with the section 120 notice. Thirdly, that she was also continuing to report in October 2018.

29. I am satisfied that nothing on the respondent's database indicated that the appellant had failed to report between 2009 and the autumn of 2015. One would expect such a failure to have been recorded. I have no doubt at all that any relevant note to that effect would have been brought to my attention by Ms Everett.
30. The reporting regime is entirely consistent with the respondent's practice of requiring individuals to maintain contact once any claim/appeal has been concluded, as was the case in late 2009 when the appellant's first appeal was dismissed.
31. I found the appellant's oral evidence on the question of reporting to be credible. She provided that evidence in a straightforward manner and, of her own volition, told me about a single occasion during her reporting history when the relevant reporting interval was extended from monthly to a six-month period. I found that particular aspects of her answers to be candid.
32. I have considered the documentary evidence contained in the appellant's final bundle. None of this has been challenged by the respondent. There is a letter from the respondent, dated 15 September 2015, relating to further submissions, which was addressed to the appellant's home address. Whilst in no way decisive, this has some relevance in relation to residence. There is also a letter from a Director/Trustee of the appellant's church, dated 17 May 2023. This confirms that the author has known the appellant since 2010. Although not stated in terms, the clear implication of the letter is that the appellant has been involved continuously with that church over the course of time. Although the author of the letter did not attend the hearing as a witness, I nonetheless attribute some weight to the evidence, particularly in the absence of any challenge by the respondent.

33. Having regard to the evidence as a whole, I agree with Ms Everett's categorisation of it as being "powerful". It is credible and reliable. It demonstrates, on a balance of probabilities, that the appellant has been continuously resident in the United Kingdom since 23 October 2002.
34. What are the consequences of this long residence?
35. In June 2022, paragraph 276ADE of the Immigration Rules was replaced by Appendix PL. PL 5.1(a) provides as follows:
- "PL 5.1. Where the applicant is aged 18 or over on the date of application:
(a) the applicant must have been continuously resident in the UK for more than 20 years
(b) ..."
36. In contrast to paragraph 276ADE(1), that provision does not require the applicant to have been continuously resident in the United Kingdom for more than 20 years *as at the date of application*.
37. On my findings of fact, the appellant has been resident in the United Kingdom continuously for 21 years.
38. I have considered the validity requirements under Appendix PL in order to assess whether, simply on a procedural basis, the appellant would be precluded from succeeding in her appeal. I note that PL1.1 requires an individual to apply online using a specified form. However, PL1.3(c) provides that, where a private life claim is made under Article 8 during an appeal (and where the respondent has given consent if it is deemed to constitute a "new matter", as has occurred in this case), the requirement to apply is waived. Ms Everett did not demur from that construction of the provisions. I conclude that that is their effect. In other words, because the appellant raised the 20 years' continuous residence issue during the course of this appeal, and given the respondent's

consent on the “new matter” issue, she need not have applied in the prescribed manner.

39. There has been no suggestion whatsoever that any suitability concerns arise in this case. It seems to me as though if, in any given case, such concerns were in the respondent’s mind, he could refuse to give consent to consideration of the “new matter” and would then be able to either conduct further checks before reconsidering the question of consent, or to require the individual to make an application.
40. It follows from the above that the appellant meets the requirements of Appendix PL5.1(a). In light of TZ (Pakistan) v SSHD, this entitles the appellant to succeed on the basis that her satisfaction of the relevant Immigration Rule would render her removal from this country disproportionate.
41. The appellant’s appeal is allowed in respect of Issue 1.

Issue 2: family life

42. There is clearly family life as between the appellant and Mr Shoniwa and as between the appellant and her two young children. That includes a genuine and subsisting parental relationship between the appellant and the children. The children are both British citizens. Therefore, section 117B(6) NIAA 2002 is engaged.
43. The question is then whether it would be reasonable for the two children to leave the United Kingdom and go to live in Zimbabwe. In undertaking this assessment I have regard to NA and Others (Bangladesh) v SSHD [2021] EWCA Civ 953, ZH (Tanzania) v SSHD [2011] UKSC 4, and Younas (section 117B(6); Chikwamba; Zambrano) Pakistan [2020] UKUT 129 (IAC). I also direct myself that I must consider the “real-world” scenario in this case.

44. I am satisfied that the family unit would, as a matter of reality, remain together. In other words, I find that Mr Shoniwa would follow the appellant and the two children were they to go to Zimbabwe. Indeed, it is his ties to that country which are of greater significance in my overall assessment of the reasonableness test relating to the children.
45. I accept that the appellant has little ties with Zimbabwe now. I accept that she has no immediate family members there and that she has been away from the country for a considerable period of time. In isolation, she would face difficulties in re-establishing herself.
46. However, I find that the appellant was not entirely candid in her evidence concerning the overall ties that her family unit has with Zimbabwe. It may be that she hoped that details of Mr Shoniwa's connections did not come out in evidence, and/or that she was very anxious about the prospect of having to go and live in a country in which she had not resided for a considerable period of time. Whatever the case was, I find that Mr Shoniwa gave credible evidence about his circumstances, albeit that much of this evidence should have been committed to writing in an updated witness statement.
47. In particular, I find that he and his family own what would seem to be a not insubstantial property in the Cranbourne area of Harare. The precise size of the property was not explored in evidence, but the implication is that it can accommodate a number of people. I find that this property is secure and would be available to the appellant's family unit if they were to go to Zimbabwe.
48. I appreciate that the country situation in Zimbabwe is far from ideal. Having said that, Mr Shoniwa has, over the course of time, taken at least two parental decisions in respect of his other children as to their residence in that country. He (presumably with the consent of his first

wife) decided that their son should spend the great majority of his life there. The son was educated there and raised with the help of family members (I do accept that Mr Shoniwa's mother passed away some time ago). A later decision was taken for Mr Shoniwa's 15-year old daughter to go and spend approximately six months at the property. Although I accept that this did not work out as hoped, it cannot be said that this was as result of inadequate accommodation or general security concerns in that country.

49. I find that there are a number of Mr Shoniwa's relations living in Zimbabwe. I am prepared to accept that some of the relationships have at times been strained. However, I also find it to be more likely than not that none of these relatives would be able to exclude the appellant's family unit from residing in the Cranbourne property. It is more likely than not that at least some support would be provided by relatives, whether that be practical and/or emotional.

50. I find that Mr Shoniwa would be able to find reasonable employment in Zimbabwe. He clearly has significant ties in the United Kingdom, but he is a resourceful individual and a dedicated parent to all of his children. I am satisfied that he would do all he could to ensure that his immediate family would be provided for upon relocation. I am also satisfied that a relocation would not prevent him from having relevant contact with his children from his first marriage, including his daughter (who now resides once again in Scotland). He has been able to travel to and from Zimbabwe in the past and, I find, this could continue in the future.

51. In summary, I find that there would be a loving and stable environment for the appellant's two young children if the family unit relocated to Zimbabwe.

52. I turn now to the particular circumstances of the two children themselves, addressing their best interests as a primary (but not determinative) consideration in the whole of my reasonableness assessment.
53. I find that their best interests lie in remaining with both of their parents. I am prepared to accept that those best interests will also lie in remaining in the United Kingdom, that being the country of their nationality.
54. I take full account of their British citizenship and all of the rights and privileges attaching to that. That citizenship is significant, but is not a trump card. There is no evidence before me to indicate that, as British citizens residing in Zimbabwe, the two children would be precluded from, for example, accessing education or health services, even if that had to be paid for. As British citizens, the children would always be able to travel to the United Kingdom (accompanied by one or both of their parents until the age of majority).
55. The very young age of the two children is of significance. Neither have started school, or indeed nursery. I find that they would be able to adapt to a new life in Zimbabwe. Given their ages, it is highly unlikely that they are really cognisant of very much more than their immediate family environment in terms of social ties. There is no evidence before me of any strong relationships with other extended family members in this country.
56. The appellant confirmed that both of the children are healthy and I find that this is the case.
57. Overall, and having regard to the best interests of the two children, I conclude that it would be reasonable for them to go and live in Zimbabwe, together with both of their parents.

58. It follows from this that the appellant herself cannot satisfy the test under section 117B(6) NIAA 2002. In respect of issue 2, the appellant's appeal fails.

Anonymity

59. There had previously been an anonymity direction in respect of this case, both in the First-tier Tribunal and the Upper Tribunal. The basis for the direction was the fact that, at that time, the case involved protection issues.

60. However, the protection issues have fallen away in light of the error of law decision and the confirmation at the resumed hearing that the sole basis on which the appellant now relied was Article 8.

61. I raised the issue of anonymity with representatives. Both agreed that the direction should be rescinded in light of the change of circumstances.

62. I have considered the importance of open justice. I am satisfied that there are no protection issues in this case, nor are they likely to be any in the future. The fact that children are involved in the case is not, of itself, reason to make or maintain an anonymity direction. There are no other features of the case (such as, for example, health conditions) which justified the making of a direction.

63. In all the circumstances, I rescind the anonymity direction previously made.

Notice of Decision

Case No: UI-2021-001311
First-tier Tribunal No: PA/50033/2021

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is allowed on Article 8 grounds in relation to the appellant's private life only.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 26 March 2024