Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23616/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 March 2014	**On 7 March 2014**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SALOME NAKASELA SIMWIZYE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Solomon of Counsel (McKenzie Solicitors)
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Zambia born on 11 October 1982. She appeals the determination of First-tier Judge Tipping who dismissed her appeal against the decision of the Secretary of State on 19 May 2013 to refuse to grant her further leave

to remain. Permission to appeal against that decision was granted by First-tier Judge Cox on 22 January 2014.

2. The appeal came before the First-tier Judge on 3 December 2013 when the appellant had the advantage of being represented by Mr Solomon who appears for her today.

3. The background circumstances and history of the appellant are summarised in paragraphs 5 to 8 of the determination as follows:

> "5. The evidence given by and on behalf of the appellant is as follows: She was born in Zambia on 11 October 1982 and at the date of the hearing she was 31. Her father came to the United Kingdom in about 1987, and was joined here by his wife and daughters in 1989. The appellant and her sister travelled on their mother's passport and were given leave to enter as their father's dependant. The appellant's father qualified to work here as a doctor and obtained a work permit to that end. The appellant remained in the United Kingdom between 1989 and 1996, and attended school here. Lanzi was born here on 24 January 1994.
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> 6. The appellants' parents were of the view that the appellant and her sister should attend boarding school, as they had. They could not afford to pay boarding school fees in the United Kingdom and therefore decided that their two daughters should be sent to boarding school in Zambia. In their covering letter dated 29 January 2013, the appellant's representatives attribute this in part to a desire that the appellant should 'maintain her cultural links' with Zambia. In 1996, the whole family returned to live in Zambia and this allowed the appellant and Josephine to return to the parents' home in Zambia during school holidays. In 2001, however, the other family members returned to live in the United Kingdom, but the appellant remained in Zambia, having decided to study at the University there between 2002 and 2007. She obtained visas in order to visit her family in the United Kingdom during some of her vacations. On graduating from the University of Zambia in 2007, she remained in Zambia, and then applied to study at the University of Manchester. Her application was initially refused on financial grounds, but eventually granted in 2010, and the appellant returned to the United Kingdom.
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> 7. Meanwhile in about 2005, her father and the remainder of the family were granted indefinite leave to remain in the United Kingdom, and have since become British citizens. The appellant approached the respondent after her return here in 2010 with a view to obtaining the same status for herself but, since she was at the time here on a visit visa, she was told that any such application would have to be made in Zambia. When she sought to make an application in Zambia, she was told that she could not qualify under the immigration rules because she was no longer a dependent minor.

> 8. The appellant last arrived here in August 2010 and was given leave to enter as a Tier 4 (General) Student. This leave was subsequently extended to 30 January 2013. The appellant pursued postgraduate studies at the University of Manchester and was awarded an MA in Economics in November 2012. On 29 January 2013, she made the application that is the subject of this appeal."

4. The judge then records that the appellant's father, who was suffering from terminal cancer, died in this country on 7 March 2013. The appellant lived with her mother, sister and brother in Barnet. The appellant was financially dependent on her mother. In addition to her family life the appellant had established private life in the UK. She was a member of her church and had carried out voluntary work and had a wide circle of friends.

5. The judge considered the appellant's claim under Article 8 within the Rules under paragraph 276ADE. It was conceded by Mr Solomon that the only sub-Section under which the appellant's appeal could succeed was that she had no ties (social, cultural or family) to Zambia.

6. Counsel relied on **Ogundimu (Nigeria) [2013] UKUT 60 (IAC)**. This, the judge considered, required a rounded assessment of all the relevant circumstances.

7. The judge records that he accepted that the appellant had first arrived in the United Kingdom in 1989 aged 6 but she had spent the majority of each of the fourteen years between 1996 (when she was about 13) and 2010 (when she was 27) in Zambia. The judge comments:

> "This period alone represents almost half of her life to date. I do not find it credible that the appellant would not have established a private life in Zambia during this extended period of her most formative years, including her teenage and the first nine years of adult life, when she attended boarding school, and then, at her own choice, the University of Zambia."

8. In paragraph 13 of the determination, the judge was not satisfied that language would be a barrier and in paragraph 15 the judge stated that he did not find it credible that the appellant would not have formed enduring friendships and other connections during this long period of residence in Zambia – a period of residence that had continued for three years after her graduation and had ended only some three years previously. The judge adds:

> "The appellant also said in the course of cross-examination that she has relatives in Zambia, an aunt (her mother's sister) and an uncle (her father's brother) and a number of first cousins. Though she said at the hearing that she was not in contact with them she gives no satisfactory reason why such contact could not be renewed, in the same way that friendships formed while she was

living in Zambia could now be taken up again. For these reasons, I do not accept the appellant's claim to have no ties with Zambia."

9. The judge accordingly dismissed the appellant's claim by reference to the Rules and turned to consider it in the light of the well known jurisprudence including **Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39** and **Razgar v Secretary of State for the Home Department [2004] UKHL 27**. The judge accepts that the appellant was unmarried and had no partner in the United Kingdom and no children and that the appellant enjoyed family life in the United Kingdom with her mother and siblings. All the family lived together and they were all adults. The youngest would be 20 shortly.

10. The determination concludes as follows:

> "17. This resumption of this family life is of recent origin, the appellant having chosen to spend her early adult years in Zambia. Even on return to the United Kingdom in 2010, the appellant studied for her MA degree in Manchester, while her family remained in Barnet. This does not suggest, despite the claims made by the appellant and her family members, that there is anything in their inter-relationships that go beyond the emotional ties that are normal between adult siblings and between an adult child and her parent. I have considered as a compassionate circumstance the appellant's father's death from cancer in March 2013. Such a death is a very sad but not an exceptional event. By dint of the leave to remain here that has ensued from this pending appeal, the family has already been able to remain together for most of the first year following the death of the appellant's father.
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> 18. I accept that the removal of the appellant to Zambia would interfere with her family life here with her mother and siblings. I am also prepared to accept, given the low threshold set by the courts, that this interference would be of a gravity such as to engage Article 8.
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> 19. As to private life, the starting point seems to me to be that the appellant is a healthy, well-educated 31-year old who, despite subsisting conflicts in the evidence, has on any calculation spent more than half her life in her country of birth, Zambia, and all but the last three years or so of her adult life there. The appellant's initial claim to have lived here continuously since 1989 (which she must have known was untrue) also to my mind reduces the weight to be attached to her evidence overall. The appellant has given no material evidence of a private life in Zambia. The considerations set out in paragraphs 13 to 15 above lead me to conclude that she had such a life there and that this could now be resumed if she returns to Zambia.

20. Indeed, the length of the periods that she has spent in Zambia and her relatively recent arrival in the United Kingdom as an adult after a absence of 14 years would alone satisfy me to the relevant standard of proof that the appellant must inevitably have a private life in Zambia to which she could now return. She would go back with the benefit of the degree that she was awarded in her home country as well as an MA degree awarded here, and there is no reason why she should not find employment and establish herself in Zambia. She also has relatives in Zambia.

21. I accept from the evidence that the appellant has also established a private life in the United Kingdom in the three years since returning to live here in 2010. Letters of support from her church and from a small number of friends are contained in the appeal and supplementary bundles, though none of these attended the hearing to give evidence on the appellant's behalf. As to her religious faith and church attendance, documents in the public domain confirm that Zambia is constitutionally a Christian country and that Christian worship is widespread there. If the appellant wishes to continue her voluntary work, there is no evidence to suggest that Zambia would not afford her ample opportunity for this. I have concluded above that the appellant has friends and connections in Zambia from the period of 14 years that she spent there between the ages of 14 and about 28.

22. Again applying the questions posed in **Razgar**, I accept that the appellant has a private life in the United Kingdom with which her removal to Zambia would interfere. Given the low threshold set by the courts, I am again prepared to accept that this interference would be of a gravity such as to engage Article 8.

23. With regard to both family and private life, given my conclusion above as to HC 395, including paragraph 276ADE thereof, the interference would be in accordance with the law. The appellant has no other right of appeal under the immigration rules. I accept, as Mr Solomon submitted, that, as far as can be discerned from the evidence, the appellant has always complied with United Kingdom immigration rules.

24. I turn to the final **Razgar** question, that relating to proportionality. Mr Solomon referred me to the decision of the IAT in **GS [2005] UKIAT 00121**. This records that the public interest in the effective maintenance of immigration control is not of fixed weight, and is therefore not unfailingly a 'trump card' in the respondent's 'hand'. I recognise that this is the case, the balance to be struck being one of proportionality that turns on the circumstances of each claim, taken in the round. Mr Solomon pointed out that, since the appellant lived with and was wholly dependent on her mother, there would, as matters currently stand, be no significant additional call on United Kingdom public resources.

25. I have studied the appellant's history and her current circumstances in the round, and have considered both her family life and her private life in the United Kingdom, I have, however, been unable to find anything in her history and circumstances that outweigh the public interest to be served by the enforcement of a firm and fair system of immigration control applicable to all."

11. Accordingly, the judge dismissed the appeal.

12. Mr Solomon relied on the grounds of appeal which he had settled on 10 January 2014. He submitted that the findings in paragraphs 16 and 17 were contradictory. In paragraph 16 the judge had found that the appellant enjoyed family life in the United Kingdom but in paragraph 17 it found that there was nothing that went beyond the normal emotional ties.

13. The judge had misapplied the appropriate burden of proof in paragraph 3 of the determination when he had referred to the burden of proof being on the appellant. The judge having been satisfied that there was family/private life which was interfered with by removal the burden shifted to the respondent – see **Ghising (Nepal) [2013] UKUT 567**. The judge had not properly applied the proportionality test in **Huang [2007] UKHL 11** and his determination was not adequately reasoned. He had failed to consider the impact on the appellant's close family members: **Beoku-Betts**. The appellant's mother said she would suffer a devastating loss if the appellant went to Zambia following the death of her husband.

14. Counsel noted that the judge had applied an exceptionality test in paragraph 17 when referring to the death of the appellant's father being very sad but not "an exceptional event".

15. In paragraph 4 of the grounds, Counsel submitted that the judge had erred in finding in paragraph 10 that the appellant had claimed to have been in the United Kingdom for a continuous period of more than twenty years because she had made it very clear in the covering letter in support of her application that the period of continuity had been broken by virtue of her returning to Zambia for education. Accordingly, the judge had erred in finding that her initial claim had been untrue, which reduced the weight to be attached to her evidence overall as he had in paragraph 19.

16. There had been discrepancies in the appellant's account on the judge's findings but the judge should not have accepted the respondent's assertions in the refusal letter without further enquiry.

17. In paragraph 6 of the grounds, the judge was criticised for not making findings on the remoteness of the appellant's ties with Zambia. Any absences from the UK related to her education there. She had no friends or close relatives in Zambia to whom she could turn to for support. Her school friends had dispersed or were married. She had no property, assets or resources in Zambia.

18. The judge had misstated the appellant's evidence at the hearing in paragraph 15. She had claimed to have a grandfather and aunt in Zambia and stated that her uncle and his children were in Namibia. Inadequate account had been taken of the appellant's evidence that she did not have contact with them and the relationship was distant.

19. Counsel referred to **Ghising [2012] UKUT 160 (IAC)** where the Tribunal had said that issues under Article 8(1) were highly fact-sensitive (see paragraph 62 of the decision). Rather than applying a blanket rule with regard to all adult children "each case should be analysed on its own facts".

20. The judge's analysis of proportionality was muddled and lacked clarity.

21. Mr Tarlow relied on the respondent's reply. When the determination was read as a whole, there was no material error of law. The conclusions of the judge were entirely open to him. The judge had taken into account the compassionate circumstances and the death of the appellant's father. The judge had accepted that the appellant had established family life and had properly applied **Razgar**.

22. At the conclusion of the submissions, I reserved my decision. I can only interfere with the judge's determination if it was materially flawed in law.

23. I note in paragraph 3 of the decision the judge refers to the burden of proof being on the appellant and the standard of proof being the balance of probabilities. This is indeed the position in most immigration appeals and I do not find that by making such a reference the judge was misdirecting himself in relation to the proportionality exercise. The judge properly directed himself in relation to Razgar and proportionality.

24. It is said that the Immigration Judge's findings in paragraphs 16 and 17 are inconsistent. However it is quite clear that the judge found that Article 8 was engaged, that the appellant was financially dependent and that the family had suffered the sad death of the appellant's father. This was taken into account as a compassionate circumstance in paragraph 17. The judge found that removal of the appellant would interfere with the appellant's family life.

25. The judge is criticised for referring to the claim that the appellant had resided in the United Kingdom continuously since 25 March 1989 in the representative's letter of 29 January 2013. The letter does indeed say that on the first page for example and indeed at the bottom of the second and the top of the third page.

26. It is said that the supporting statements made the matter clear but the judge had the benefit of hearing the appellant give oral evidence and he records that the matter was put to the appellant at the hearing. As the judge says in paragraph 19 of the decision on any calculation the appellant has spent more than half her life in her country of birth (Zambia) and all but the last three years or so of her adult life in Zambia.

27. In my view it was open to the judge to conclude on the evidence as a whole that the appellant could resume life in Zambia, a country with which she had not broken her ties. The judge refers to the case of **Ogundimu** and I am not satisfied that he misdirected himself in his analysis of what constituted ties.

28. The judge refers to the case of **Beoku-Betts** and I am not satisfied that his decision was arrived at without considering the impact on all concerned. The judge refers to the written statements lodged in paragraph 4 of his decision, as well as the skeleton argument lodged by Mr Solomon.

29. The judge gave weight to the appellant's father's death but noted that the family had been able to remain together for a period following the death.

30. The judge is criticised for referring to the fact of the death not being an exceptional event. It is said that the judge applied the exceptionality test. I am far from satisfied that this is the position. The determination needs to be read as a whole. The judge did not arguably misdirect himself as claimed when referring to the father's death.

31. The judge correctly addressed himself that the proportionality exercise turned on the circumstances of each case taken in the round. There is no indication that the judge failed to conduct this exercise properly and I am not satisfied that his analysis was muddled or confused as claimed. It was perfectly open to the judge to conclude that the appellant must inevitably have a private life in Zambia to which she could return and that she would return with the benefit of the degree that she had been awarded in Zambia as well as the MA degree awarded in the United Kingdom. There was no reason why she should not find employment and establish herself in Zambia where she had relatives. I should also note that it is accepted that the appellant does have relatives in Zambia, although the judge does refer to one relative who was in fact in another country. It is clear that the judge did not accept the appellant's claim to have no ties with Zambia and he did have the advantage of hearing her give evidence together with other members of her family.

32. I accept the submissions made by Mr Tarlow that there is no material error of law in the determination and that the findings made by the judge were open to him.

33. Accordingly, this appeal is dismissed.

Signed Date 5 March 2014

Upper Tribunal Judge Warr