Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43876/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 July 2014	**On 28 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TARIRO NYARADZAI MATANGA

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Miss Iqbal, Counsel, instructed by Fisher Meredith

DETERMINATION AND REASONS

1. The respondent, who I shall refer to as the appellant as she was before the First-tier Tribunal, is a citizen of Zimbabwe and her date of birth is 18 November 1986. She made an application to vary her leave to remain in the UK on 5 September 2013 on

the basis of her private life. She came to the UK on 29 August 2004 as a student having been granted a student visa until 31 October 2006. She was granted further leave until 9 September 2013. The appellant was aged 17 when she first came to the UK.

2. The Secretary of State refused the application under the Rules and Article 8 of the 1950 Convention on Human Rights on 7 October 2013. The appellant appealed against this decision and her appeal was allowed under Article 8 by Judge of the First-tier Tribunal Meates in a decision 29 April 2014 that was promulgated on 1 May 2014 following a hearing on 26 March 2014. On 28 May 2014 the Secretary of State was granted permission to appeal against the decision of the First-tier Tribunal. Permission was granted by Judge of the First-tier Tribunal Ransley. Thus the matter came before me.

The Decision of the First-tier Tribunal

3. The First-tier Tribunal heard evidence from the appellant and her father, Mr J Matanga. The appellant's evidence was that her immediate family; namely her mother, father and brother, in the UK. Her mother had come to the UK in 2004 having been granted a visa pursuant to the highly skilled migrant programme and the appellant's father came here as her dependant. The appellant came to the UK as a student. She has finished her degree here and she has qualified as a pharmacist. She works as a locum pharmacist at various hospitals. She lives independently from her family with a cousin in London and her parents and her younger brother (who is presently studying A levels in the UK) live in Northampton. The appellant has returned to Zimbabwe on two occasions once in 2006 and once in 2011. Her maternal and paternal grandmothers live in Zimbabwe and she speaks to them sporadically on the telephone. The appellant and her family came to the UK as a result of the political climate in Zimbabwe at that time and her father is affiliated to Morgan Tsvangirai. The appellant's father's evidence was that he was in the process of starting a wholesale pharmaceutical business selling products to Africa and that his daughter was the lynch pin to this business given her qualifications.

4. The judge made findings at paragraphs 17 to 22 of the determination as follows:

> "17. In this appeal the burden of proof is on the appellant to the normal civil standard, namely on the balance of probability. It is accepted that the appellant does not meet the requirements of the grant of leave under the Immigration Rules namely paragraph 276ADE and Appendix FM. In line with the decision in **MF [2012] UKUT 00393**, approved in **(Article 8 – New Rules) [2013] UKUT 0045** I go on to consider the appellant's Article 8 claim by reference to the established case law.
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> 18. In assessing the appellant's Article 8 claim I adopt the five stage process set out in the case of **R (Razgar) – v – SSHD [2004] UKHL 27**. In considering the first stage of that test I asked whether the removal of the

appellant would amount to an interference with the exercise of her right or respect of private and family life. The appellant arrived in the United Kingdom on 29 August 2004 aged 17. She has completed the latter part of her education in the United Kingdom and has now engaged in her chosen profession, clinical pharmacy, on the basis of educational qualifications obtained in the UK. Thus I accept that private life has been established in the UK. In addition, albeit the appellant is an adult, it is clear that there is a degree of family life in the UK as between her, her mother and father and her brother. Her sister lives in Canada.

19. Obviously should the appellant be removed from the UK there would been an interference with that private and family life that she has established of such gravity to engage Article 8 of the ECHR. The issue therefore is whether the proposed interference is in accordance with the law and for a legitimate public end. There has been no suggestion that the interference would be other than in accordance with the law and I conclude that it would be for a legitimate public end that is to maintain an effective immigration control.

20. The crucial issue is therefore whether the proposed interference is proportionate to this legitimate end. In considering the appellant's relationship with her family I conclude that they do not exceed the level for ties envisaged in **Kugathas v SSHD [2003] EWCA Civ 31** as it the case that the relationship between the appellant and her parents can be characterised as a relationship exercising no more than normal emotional ties. It is the appellant's case that she has established a business with her parents the intention of which is to export pharmaceutical products to Africa. However this is a business arrangement which does not take the relationship beyond the normal emotional ties as outlined in **Kugathas**. Indeed the appellant's parents have indicated that as they would not be able provide for her financial support in Zimbabwe although this is at odds with the representations submitted on the appellant's by behalf under cover to letter of 5 September 2013 in which it is stated that her parents provide her with additional financial support in the amount of £500 per month. I find it unlikely that her parents would not be able to make some funds available to provide practical financial support to the appellant if she were to be returned to Zimbabwe.

21. The appellant claims that she would not be able to secure employment in Zimbabwe as a pharmacist. She claims that there are no pharmacies in the area where either of her grandmothers live. This may well be the case. However there is no reason whether or not the appellant cannot establish herself in a major city initially with the financial support of her parents. Whilst the appellant may experience some difficulties in practising as a clinical pharmacist I do not believe, without time and a degree of retraining as a clinical practices, she would not be able to eventually

practice in her chosen profession. Thus whilst the appellant has established private life in the United Kingdom there is nothing at all in her circumstances, that would lead me to conclude that private life could be re-established to some degree in Zimbabwe. Having said that the real issue is proportionality. The fact of the matter is that this appellant as remained in the United Kingdom lawfully for some nine and a half years. She has obtained UK qualifications and I accept, to some degree that these qualifications will not be easily recognised in Zimbabwe. From these qualifications she has managed to secure employment within the NHS as a clinical pharmacist. She therefore continues to make a contribution to them in terms of the nature and fact of her employment. Indeed her employment is as a result of a lengthy, and it would appear successful, education within the UK education system. Whilst her family life does not go beyond the normal emotional ties, the fact is that the majority of the appellant's immediate family now reside in the UK and the ties that have been established would not continue in the same form were the appellant required to leave the UK. It is beyond doubt that the appellant would have a particular difficulty in returning to the UK even as a visitor.

22. This is a case in which the proportionality of the respondent's decision is finely balanced. However bearing in mind the above, as well as the fact that the appellant will shortly achieve 10 years' residence in the UK, a period at which the respondent herself recognisees that a grant of leave is appropriate, I conclude the decision of the respondent is not proportionate. In my view it would not be reasonable for the appellant to be required to relocate to Zimbabwe."

5. The judge accepted that the appellant could not meet the requirements of the Rules and he went on to consider the appeal under Article 8 in accordance with **Razgar v SSHD [2004] UKHL 27**. He accepted that the appellant had a family and private life here and that there would be an interference with this and that the interference would be necessary. He went on to find that the decision would not be proportionate at paragraph 22.

The Grounds Seeking Leave to Appeal and Oral Submissions

6. The grounds seeking leave to appeal argue that the judge did not take into account relevant jurisprudence including **MF (Nigeria) [2013] EWCA Civ 1192**, **Gulshan [2013] UKUT 00060 (IAC)** and **Nagre [2013] EWHC 720 (Admin).** It is argued that the Immigration Rules are a complete code and the First-tier Tribunal did not give adequate reasons why there were compelling circumstances that would allow the Tribunal to allow the appeal outside the Immigration Rules. It is argued that there were no exceptional circumstances and there was no reason why the appellant could not continue private and family life in Zimbabwe.

7. Mr Melvin made oral submissions in the context of the written submissions that he had submitted at the start of the hearing and he expanded on the grounds seeking permission in oral submissions. Miss Iqbal submitted that although there was no reference by the judge to relevant case law, the judge completed the necessary exercise under Article 8 and she referred me specifically to paragraph 21 which in her view sets out why the judge found that there were arguably good grounds for granting leave outside the Rules.

Conclusions

8. It is my view that the judge materially erred in law. He did not apply the guidance in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC), R (Nagre) v SSHD [2013] EWHC 720 (Admin)** and this was a material error because the proportionality assessment carried out by the judge was flawed. He did not attach weight to the fact that the appellant was unable to satisfy the requirements of the Immigration Rules (the relevant Rule in this case being that under paragraph 276ADE). The appellant cannot satisfy the Rules because she has not been here for twenty years and she has not established that she has no ties with Zimbabwe. The appellant accepted that she did not meet the requirements of the Rules at the hearing before the First-tier Tribunal. The judge did not identify compelling circumstances and the balancing exercise under Article 8 was inadequate.

9. I set aside the decision to allow the appeal under Article 8 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and I remake it pursuant to Section 12(2)(b)(ii). No further evidence has been submitted in accordance with the directions issued by the Upper Tribunal on 10 June 2014 and the directions made it clear that in the event that an error of law is found the decision could be remade at the hearing before me.

10. Mr Melvin argued that I should remake the decision. Miss Iqbal requested that the matter be remitted to the First-tier Tribunal for a rehearing. She indicated that there has been further developments in the appellant's father's business. I went on to remake the decision without a further hearing on the evidence that was before the First-tier Tribunal, the appellant having been given ample opportunity to submit further evidence and has not done so.

11. There was an appellant's bundle before the First-tier Tribunal comprising 107 pages and there is no challenge to the evidence as recorded by the judge in his determination. There is no challenge to the primary findings of fact. It is a fact that the appellant does not meet the requirements of the Immigration Rules and it has never been argued otherwise. The appellant is aged 27 and she lives independently from her parents. The First-tier Tribunal found that there was no family life in the **Kugathas v SSHD [2003] EWCA Civ 31** sense and there is no reason for me to go behind this finding. However it is obvious that the appellant has a private life here and that she has a family life within the context of her private life.

12. The appellant came here with her family when she was aged 17 in order to study. The family came on a temporary basis only. There is no persuasive evidence that the appellant or other family members would be at risk of persecution or serious harm should they return to Zimbabwe and it is a fact that there has been no asylum claim made by the appellant or her parents. The appellant has returned to Zimbabwe on two occasions. The appellant's father has a business here and it seems that it is intended that the appellant will play a pivotal role in that.

13. The First-tier Tribunal found that it was unlikely that the appellant's parents could not provide her with support should she returned to Zimbabwe. The judge found that there was no reason why the appellant could not establish herself in a city in Zimbabwe where she would eventually be able to practise as a pharmacist. The judge found that she could establish private life in Zimbabwe. I have taken into account that the appellant was a teenager when she came to the UK and the family's decision to come here should be viewed in the context of the political problems in Zimbabwe at the time. She and her family have been here for a significant period of time. There is no reason to challenge the appellant's father's evidence that he has as business here and intends for his daughter to play a significant role in this. However, these factors in my view do not amount to arguably good grounds for granting leave outside the Rules.

14. There is no requirement for me to consider an assessment under article 8 in accordance with **Razgar, R (on the application of) v SSHD [2004] UKHL 27,** but I will go on to do so. It is clear that the first three questions should be answered in the affirmative. Once this stage is reached the burden of justification rests on the Secretary of State. In my view the decision is necessary in pursuance of the legitimate aim (the economic wellbeing of the country through the maintenance of immigration control). The appellant cannot meet the requirements of the Rules and I attach significant weight to this. There are no compelling or exceptional circumstances in this case.

15. There are no compelling or exceptional circumstances and the decision is proportionate. The immigration Rules in this case interfere with the appellant's right to private life but this interference is justifiable, proportionate and lawful. I remake the decision of the First-tier Tribunal and dismiss the appeal under Article 8 of the 1950 Convention on Human Rights.

Signed Joanna McWilliam Date 25 July 2014

Deputy Upper Tribunal Judge McWilliam