



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/25211/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 10 July 2018

Decision & Reasons Promulgated  
On 07 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

PETRONELLA RUSERE  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr B Mutebuka of Mutebuka & Co.

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Telford promulgated on 5 March 2018 dismissing the Appellant's appeal against a decision of the Respondent dated 12 October 2016 refusing her human rights claim.
2. The Appellant is a national of Zimbabwe born on 29 January 1981. She arrived in the United Kingdom on 26 November 1997 and obtained leave to enter as a visitor valid until 27 May 1998: she would have been 16 years old at the time of entry to the United Kingdom. The Appellant applied for variation of leave to remain as a student before

the expiry of her visitor leave, which was granted until 1 August 1998. A further application for leave to remain as a student was granted until 18 June 1999. It appears that upon the expiry of this leave the Appellant became an overstayer. By this stage she would have recently passed her 18<sup>th</sup> birthday.

3. On 29 October 2012 the Appellant made an application outside the Immigration Rules on compassionate grounds. The application was refused on 11 October 2013. Notwithstanding this refusal, the Appellant remained in the United Kingdom.
4. On 28 April 2016 the Appellant was served with documents in relation to her immigration status. Shortly thereafter, on 26 May 2016, she made the human rights claim the refusal of which is the subject of these proceedings.
5. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 12 October 2016.
6. Insofar as the Respondent's decision maker considered issues in relation to paragraph 276ADE (1) of the Immigration Rules, reference was made to the 'suitability' requirements in Appendix FM: it was accepted that the Appellant met the suitability requirements, (see RFRL paragraph 10). Nonetheless, it was otherwise considered that the Appellant did not satisfy the requirements of paragraph 276ADE: she had not reached the 20-year threshold of paragraph 276ADE(1)(iii), and it was otherwise considered that there would not be very significant obstacles to her integration into Zimbabwe pursuant to paragraph 276ADE(1)(vi). It was otherwise considered that there were no exceptional or compassionate circumstances to warrant a grant of leave outside the Immigration Rules.
7. The Appellant appealed to the Immigration and Asylum Chamber.
8. The appeal was dismissed for reasons set out in the Decision of Judge Telford promulgated on 5 March 2018.
9. The Appellant applied for permission to appeal to the Upper Tribunal, which was granted by First-tier Tribunal Judge Murray on 25 April 2018.
10. The Respondent has served a Rule 24 response dated 9 July 2018 resisting the appeal. Mr Melvin apologised for the late service of the Rule 24 response. In the event it contained nothing by way of surprise to Mr Mutebuka; Mr Melvin in any event would have traversed essentially the same territory in his oral submissions.
11. I note that in support of the Appellant's application she relied in part on her relationship with her sister and her nephew. Her sister gave evidence before the First-tier Tribunal. Although before the First-tier Tribunal it was indicated that the Appellant was not relying upon family life as between herself and her sister or as between herself and her nephew, nonetheless necessarily such relationships form an aspect of the Appellant's private life.

12. The Appellant's application was also supported by a number of letters from friends and acquaintances who spoke of their relationship with the Appellant, their shared experiences, and the personal qualities of the Appellant. There were similar materials included in the bundle before the First-tier Tribunal.
13. The materials in the bundle before the First-tier Tribunal also contained references to the Appellant having a son born in the United Kingdom on 22 October 2017. I will return to this aspect of the case below: suffice to say for the moment that it was not a matter that seemed to feature before the First-tier Tribunal, and/or otherwise did not find its way into the Decision of the First-tier Tribunal at all. A reading of the Decision reveals nothing whatsoever to indicate that the Appellant was the mother of a child present in the United Kingdom. Be that as it may, this is not a feature of any aspect of the challenge brought to the Upper Tribunal and accordingly I disregard it in considering the issue of 'error of law': see further below.
14. I am concerned, however, that the Decision of the First-tier Tribunal Judge contains, in my judgment, no analysis or finding in respect of the extent and quality of the Appellant's private life in the United Kingdom. Axiomatic to a fair and proper decision in an Article 8 case is an examination of the private life relied upon. It forms the very basis of the question of whether such private life is being subjected to interference, the gravity of any such interference, and it informs the evaluation of proportionality. I find nothing approaching such analysis or findings herein.
15. The Decision has a sub-heading 'Findings and Reasons' between paragraphs 16 and 17. The first sentence of paragraph 17 refers to the Appellant as being "*a perfectly pleasant single young woman of 27 years*", which is followed by a vague reference to the Appellant having "*many traits associated with her life over the past two decades in the UK*".
16. What exactly is meant by 'traits' is not overt. The sentence certainly does not represent a considered analysis or finding in respect of any of the elements of the Appellant's private life. Indeed in context 'traits' appear to be a reference to characteristics of national culture; the next sentence is "*She also exhibits many traits from her country of origin, Zimbabwe*". The Judge then makes reference to the commonplace circumstance of some people having aspects of more than one culture. Whilst this is a sustainably relevant – albeit generalised – factor in consideration of obstacles to return and integration, it carries nothing by way of analysis of the individual's private life in the UK.
17. The closest the Decision approaches to anything like a finding in this regard is at paragraph 20 where the Judge says:

*"I found however, that I was unable to accept all that the appellant stated about the facts of her life in the UK and what life in Zimbabwe now would be for her. I did not find the whole of the appellant's evidence entirely consistent, altogether plausible and I did find in addition that it was unnecessarily vague in areas where I would have thought it should have been clear".*

18. However, nothing preceding or following paragraph 20 refers to, or explains, the Judge's apparent finding that he was unable to accept all that the Appellant had said about the facts of her life in the United Kingdom. There is no distinction made as to what the Judge did accept and what he did not. There is no reference to what elements of her evidence of her life in the UK the Judge considered to lack consistency or plausibility. There was no identification or illustration of what in her evidence was considered to be 'unnecessarily vague', or why it was considered so.
19. Quite simply, there are no findings. Moreover there are no proper reasons for the generalised criticism of the Appellant's testimony. In my judgment the Decision is fundamentally flawed.
20. The Judge also fell into error in respect of the issue of suitability.
21. I have indicated above that the Respondent's decision-maker found that the requirements in respect of the Immigration Rules on suitability were met. However, the Judge went behind this finding seemingly without raising the matter with the parties.
22. At paragraphs 11-13 the Judge considered the Appellant's immigration history by reference to Appendix FM paragraphs S-LTR.1.2 to S-LTR.2.3 and S-LTR.3.1 - being the provisions referred to in paragraph 276ADE(1)(i) - and reached a conclusion in these terms:

*"There does seem some force in the 'unsuitable' classification of the appellant. Here the frank admission by the appellant today that she worked illegally up until the date of decision, that she had always worked illegally and intended to carry on doing so until forced to stop indicates that the Rules cannot help the appellant. This is because illegal working constitutes conduct and other reasons for being deemed unsuitable"*.
23. In my judgment it was procedurally unfair for the Judge to rely upon suitability without having raised it with the parties directly. Moreover, it is not apparent that the Judge was cognisant of the fact that the Respondent had essentially conceded this point.
24. I acknowledge that the Judge nonetheless sought to consider matters in the alternative: *"If wrong about that approach in law, then I go on to consider 276ADE(1)(vi)"* (paragraph 14). Accordingly I have considered whether the Judge's alternative consideration of the Appellant's case is such that the error in ignoring or overriding the concession on suitability can be said to be immaterial such that it would not warrant interference with the Decision.
25. In this context - and indeed generally - it is to be recalled that ultimately this was an appeal being determined on Article 8 grounds and not under the Immigration Rules. When the Judge moves from a consideration of the Rules and expressly addresses Article 8 and proportionality, amongst other things the following is stated:

*“It is never an easy thing to decide these kind of cases. I do not decide this lightly. I do not decide it on the basis solely of the illegal actions of the appellant although the evidence on that cannot simply be put to one side due to other positive factors in her favour as was submitted. On the basis of the whole evidence and on balance I find the respondent’s decisions and actions lawful and the appeal fails”.*  
(paragraph 27)

26. It seems clear enough from this passage that the Judge did factor into the overall consideration of proportionality the Appellant’s poor immigration history not only in the context of having been an overstayer and perhaps having also remained in defiance of the decision in October 2013, but also her conduct as a person who worked in the UK without permission – *“the illegal actions”*. I do not suggest that such matters are to be disregarded; indeed they are very relevant to the issue of proportionality. However, in the particular context of this Decision it is apparent that the Judge saw the Appellant’s conduct as breaching the threshold of the ‘suitability’ standard set under the Immigration Rules: that is his finding at paragraph 13, a paragraph which emphasise the illegality of the Appellant’s actions and conduct. I do not consider it may safely be concluded that when the Judge again referred to *“illegal actions”* at paragraph 27 he was disregarding his conclusion on ‘suitability’ under the Rules. In my judgement it is very likely that the Judge’s views on suitability – arrived at in error of law – impacted upon the proportionality assessment.
27. Moreover, it is to be noted that insofar as the Judge sought to give an alternative consideration to the case lest he be wrong on ‘suitability’, such alternative consideration was expressed to be by reference to paragraph 276ADE(1)(vi) (paragraph 14). It is not overt that this ‘alternative approach’ was taken in to the evaluation of proportionality on a freestanding assessment of Article 8.
28. In all such circumstances I am not prepared to disregard the Judge’s error on suitability as being immaterial.
29. I am also concerned about one further aspect of the Judge’s decision.
30. At paragraph 24 the Judge states:
 

*“There is no duty on the state and the taxpayers of the UK to fund a lifestyle choice by the appellant”.*
31. In the abstract this is a correct and unobjectionable statement. However, in the context of the instant case its presence is unclear and unexplained. There is no analysis of the Appellant’s financial circumstances, and there is no analysis or finding as to whether the Appellant was a person who would be financially self-reliant or would be a drain on public funds. Paragraph 24 appears to have adverse connotation, and yet there is no exploration of evidence, or any findings of fact, to make such a comment relevant to the facts of the Appellant’s case.
32. Accordingly I find that the decision of the First-tier Tribunal Judge contains material errors of law and is to be set aside.

33. I also conclude that the decision in the appeal requires to be remade pursuant to a new hearing before the First-tier Tribunal with all issues at large. This is essentially because of the absence of any clear findings in respect of the Appellant's private life.
34. There is also another further feature which in part influences my decision not to proceed to remake the decision immediately or otherwise to retain the matter in the Upper Tribunal.
35. I have made reference above to the fact that the Appellant is a mother. Materials were filed before the First-tier Tribunal in respect of this circumstance, and also in respect of the Appellant's relationship with an Albanian national present in the United Kingdom. I am told that the Appellant's child remains in her custody and care. I am also told that the relationship continues. Before the First-tier Tribunal it was indicated that the Appellant was not relying on family life as between her sister and her nephew or any other family members in the United Kingdom, and was also "*withdrawing her claim to remain on the basis of any family relationship with her claimed boyfriend or partner*" (paragraph 8). It was noted that the boyfriend had not made a statement and was not providing evidence, and had no legal right to remain in the United Kingdom. Nothing, however is recorded about the Appellant's child.
36. I sought clarification in this regard from Mr Mutebuka - who had also appeared before the First-tier Tribunal. He confirmed that it was the case that the Appellant's partner had no legal basis to be present in the United Kingdom, and to that extent it was considered that the Appellant's relationship with him could not avail her in the context of her own Article 8 appeal.
37. So far as the child was concerned, it was indicated that the position was essentially that in the event that the Appellant were removed from the United Kingdom she would take the child with her. However, no particular consideration seemed to have been given to the impact of the Appellant's departure with her child on the relationship between the child and the child's father.
38. Be that as it may, it was clear that an informed election was made on the part of the Appellant not to pursue any matter in relation to the circumstances of her child before the First-tier Tribunal. For that reason I have not given the matter any consideration in the context of my evaluation of 'error of law'.
39. I accept - as Mr Melvin has cautioned - that it is not for the Tribunal to seek to uncover points that might be available to the Appellant that perhaps have not been yet exploited. Nonetheless, I do consider it appropriate pursuant to the obligations on public bodies in respect of the welfare of children to at least raise enquiry as to whether or not there is any issue in respect of the best interests or welfare of a child that might be relevant to any proceedings before the Tribunal.
40. It may be that upon consideration the view will be taken that there is no merit in seeking to raise any such issues. However, it seems to me that the Appellant should now be afforded the opportunity of giving some thought to the possible impact on the relationship between child and father in the event of the Appellant's removal from the

UK - which, as I say, does not seem to have been explored hitherto – and as such the Tribunal should not proceed forthwith to remaking the decision.

41. Further, I have noted above the absence of any findings in respect of the Appellant's financial circumstances. The Appellant may now wish to provide some further information and evidence in respect of her financial circumstances - including how she anticipates surviving in the United Kingdom as a new mother without being a burden on the public purse in the event that she be granted leave to remain. The Appellant should be aware that in the absence of such evidence an adverse inference may be drawn by the Tribunal.
42. Finally, I observe that by now the Appellant has passed the 20 years 'yardstick' in paragraph 276ADE(1), and I recall that the Respondent's decision-maker did not identify any adverse feature in respect of suitability such as would stand in the way of a successful application under paragraph 276ADE(1). In such circumstances it may be that the Secretary of State will wish to review the Appellant's circumstances and reconsider the decision to refuse leave to remain in the United Kingdom. That is entirely a matter for the Secretary of State and I express no view on the merits one way or the other. In the event, however, that the Respondent does take a different view of this case, then of course the Tribunal should be informed in the usual way so that the appeal may be brought to a formal conclusion without unnecessarily troubling the listing office.

### **Notice of Decision**

43. The decision of the First-tier Tribunal contained an error of law and is set aside.
44. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Telford with all issues at large.
45. No anonymity direction is sought or made.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed:

Date: **30 July 2018**

**Deputy Upper Tribunal Judge I A Lewis**