Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08808/2017**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision and Reasons Promulgated**
On 6 September 2019	**On 20 September 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr A McVeety (Senior Home Office Presenting Officer)
Respondent: In Person (but assisted by Mr D Forbes as a McKenzie Friend)

DECISION AND REASONS

1. On 25 August 2017 the Secretary of State for the Home Department (the Secretary of State) refused to grant the claimant leave to remain on human rights grounds. The claimant appealed to the First-tier Tribunal (the tribunal) and in a decision sent to the parties on 7 September 2018, following a hearing of 7 August 2018, the tribunal allowed the claimant's appeal. It did so because it concluded she met the requirements of the Immigration Rules concerning private life as contained in paragraph 276 (ADE) of those Rules and that she also met the requirements of Article 8 of the European Convention on Human Rights (ECHR) outside the Rules. But the Secretary of State sought and obtained permission to appeal to the Upper Tribunal and, in a decision sent to the parties on 22 July 2019, following a hearing of 1 July 2019, I set aside the tribunal's decision

and directed that the decision under appeal be remade by the Upper Tribunal after a further hearing. But I preserved the tribunal's factual findings. My reasoning as to why I decided to set aside the tribunal's decision may be found in my written decision of 17 July 2019. It is not necessary for me to repeat those reasons here but, essentially, I thought that with respect to the application of paragraph 276 ADE, the tribunal had failed to properly focus upon the question of obstacles to integration upon return and that that error had carried over into its assessment of the position under Article 8 outside the Immigration Rules because it had expressly relied upon its view that the requirements of those Rules had been complied with when justifying its decision outside the Rules.

2. The matter next came before me on 6 September 2019 for remaking purposes. At that hearing representation was as indicated above. I am grateful to Mr McVeety, Mr Forbes and the claimant herself. I received some brief oral evidence from the claimant and was then addressed by Mr McVeety and Mr Forbes. I confirm I have taken into account all of what was said at the hearing. Further, I have taken into account the content of all of the documentation which has been provided by each party.

3. As to the background, the claimant has a lengthy immigration and adjudication history. She was born on 13 January 1972 and is a national of Zimbabwe. She entered the UK on 11 September 2001 as a visitor. Her leave as a visitor expired relatively shortly afterwards, (I am not sure of the precise date of expiry but it would almost certainly have been no more than six months after her date of entry) and she remained in the UK unlawfully. In July of 2007 she claimed asylum on the basis of political opinion but that claim was refused by the Secretary of State on 17 December 2007 and an appeal was dismissed on 28 February 2008. Further representations were sent to the Secretary of State, on her behalf, initially without any success at all, but representations made on 3 August 2017 did lead to the Secretary of State considering whether the claimant was entitled to asylum on the basis of her sexual orientation. However, on 25 August 2017, the Secretary of State decided that there was no such entitlement and on 16 October 2017 a tribunal dismissed her appeal against that decision. But permission to appeal was granted to the Upper Tribunal and on 22 May 2018 the Upper Tribunal decided that the tribunal had erred in law and remitted to the tribunal but only in relation to Article 8 of the ECHR with respect to family life and private life. The tribunal's negative decision (from the claimant's perspective) with respect to entitlement to international protection was not disturbed. It was that remittal which led to the tribunal's decision of 7 September 2018 referred to above.

4. The claimant's case in now seeking leave under Article 8 of the ECHR and in pursuing her remitted appeal may be summarised as follows: She has resided in the UK, albeit for the most part unlawfully, since 11 September 2001. There are compassionate circumstances in that she is HIV positive. She has many close family members residing lawfully in the UK including a cousin whom she had grown up with in Zimbabwe; two sisters; her adult daughter; a brother; and an uncle. She no longer has any close family members in Zimbabwe and the whereabouts of certain of her close family members not mentioned above are now unknown. So, she would have no-one to assist her if she was required to return to Zimbabwe. She has been and still is both financially and emotionally dependent upon her UK-based relatives. Certain of her close family members, including her mother and her older sister, have sadly passed away.

5. The tribunal which issued its decision on 7 September 2018 essentially accepted the evidence of the claimant regarding the presence of the above family members in the UK and the lack of any known close relatives still in Zimbabwe. It accepted the claimant's HIV-positive status. It accepted the passing of the claimant's mother and sister. It accepted, in effect, that the claimant is emotionally dependent upon her siblings and cousins in the UK. So, since I had decided to preserve its findings, that formed the factual framework for my deliberations.

6. As to Article 8 private life issues within the Immigration Rules, the relevant Rule is paragraph 276 ADE (1)(vi). Since the Secretary of State accepts that the claimant does not fall foul of any of

the Suitability Requirements contained in Appendix FM to the Rules, the issue is under the Rules is whether the claimant is a person who has lived continuously in the UK for less than twenty years but in respect of whom there would be very significant obstacles to her integration into the country to which she would have to go if required to leave the UK (Zimbabwe). It is for the claimant to demonstrate, to a balance of probabilities, that she meets that test.

7. Mr McVeety, for the Secretary of State, stressed that that test is, as he put it, "a tough one". Mr Forbes, speaking for the claimant, stressed that what is required is a broad evaluative assessment. He pointed out that the claimant would be seeking to integrate into a society she had left some eighteen years ago and that building up relationships with people she does not know in Zimbabwe will be difficult and that those difficulties will be exacerbated by what he described as the "exodus" of her family members from Zimbabwe.

8. In my view Mr McVeety is right to stress the high threshold which paragraph 276 (ADE) (1)(vi) sets. 'Very significant obstacles' is a high hurdle and the word 'very', obviously plays an important part in underpinning that. I have no doubt that going back to live in Zimbabwe having spent some eighteen years or so in the UK will be very difficult for the claimant. I proceed, on the basis of the preserved findings, that she does not currently have any close family in Zimbabwe and would lack support if she had to go there. I accept that her HIV-positive status will make matters more difficult for her but it was not argued before me that, for example, she would not receive appropriate treatment should it be needed. I bear in mind the preserved findings regarding a considerable number of close relatives in the UK and the emotional dependency that the claimant has upon at least some of those relatives. But that matter, of itself, is not one which directly goes to the question of the nature and substance of obstacles to reintegration. Putting everything together I have concluded, notwithstanding Mr Forbes careful arguments, that I must accept Mr McVeety's persuasive submissions to the effect that the claimant has not demonstrated that she reaches the required threshold. So, I have concluded that the claimant fails under the Immigration Rules.

9. That, though, is not the end of the matter. I must now go onto decide whether the claimant is able to succeed under Article 8 of the ECHR, outside the rules, on private and/or family life grounds. As to that, Mr McVeety indicated his acceptance that there was family life sufficient to engage Article 8. He accepted that there were some factors weighing in the claimant's favour and that my decision would be a "close call". But he also stressed the importance of the maintenance of immigration control. Mr Forbes stressed the presence of many relatives in the UK and doubted that there was, in the circumstances of this case, a legitimate interest in requiring her to leave. It would, he suggested, be disproportionate to return her to Zimbabwe to be, in effect, "an offshore dependent" of her UK-based family members and he argued that there were, here, exceptional and compelling circumstances. The claimant herself confirmed to me that she was happy to rely upon the points Mr Forbes had made to me.

10. There are some things I must say straight away. Article 8 is not to be used as a "general dispensing power". Further, a case should not be resolved in favour of a claimant simply because there might be compassionate circumstances. There is, in considering Article 8 outside the rules, a five-stage process as set out in *Razgar* [2004] UKHL 27. If matters reach the stage where a proportionality assessment is called for it is necessary to take into account the content of Section 117B of the Nationality, Immigration and Asylum Act 2002 with respect to family and private life. The consideration under Article 8 outside the Rules is a proportionality evaluation or, put another way, a balance of public interest factors. Some factors are heavily weighted including that of the importance of immigration control. The Secretary of State's policy is that where the requirements of the Rules are not met leave should only be granted under Article 8 where exceptional circumstances apply. That is the approach I must take and the legality of that policy and test was accepted by the Supreme Court in *Agyarko and Ikuga v SSHD* [2017] UKSC 11.

11. As I have indicated Mr McVeety accepted that Article 8 of the ECHR was engaged on the basis of family life. It is obvious that any interference with Article 8 rights is lawful in the sense that

the law provides for it in principle, and that it is in pursuance of a legitimate aim which is that of immigration control. So, matters boil down to a consideration as to proportionality and as to whether there are exceptional circumstances demanding success under Article 8 outside the Rules notwithstanding the failure to succeed within the Rules.

12. The interests of immigration control is an important consideration in all cases but, specifically, in this case because the claimant has overstayed her leave and then spent a considerable period of time residing in the UK without leave. As to other section 117B factors, the claimant does speak English (the ability to do so is not a positive factor in her favour but it means no damage is caused to her case through an inability to do so) but is not currently supporting herself financially (a matter which does damage her case). Her status in the UK has, aside from the first six months or so, been unlawful and has always been precarious, which means only little weight can be attached to private life aspects. So, for the most part, incorporation of the section 117B factors damages her claim. As does her failure to bring herself within the terms of any immigration rule concerning private or family life. It is also the case that if she has to return to Zimbabwe she will be returning to a country where she was born and where she has resided, not only as a child, but as an adult too, in the past.

13. I must now look at matters which might be taken to weigh in the claimant's favour. She has lived in the UK for an extensive period of years. Whilst I am statutorily obligated to give little weight to private life built up over that period of time I do not and am not required to attach no weight at all to that period of long residence. The claimant is HIV-positive. Not very much of that consideration was made before me but it forms part of the factual background (indeed a significant part) in the sense that living with that condition is not without its difficulties and is a matter which might lead to a need for emotional reliance upon close family.

14. As to close family, the claimant has, amongst other relatives, two sisters, a brother and her daughter in the UK. She does not know the whereabouts of any other family members. It was found, in preserved findings, that there were elements of emotional dependency such that family life did exist (notwithstanding all protagonists are adults) between the claimant and her close family members in the UK. The claimant has, it is fair to say, experienced some trauma over the years with the death of family members, her losing touch with others, their whereabouts not being known, and receiving her HIV-positive diagnosis. Ordinarily those sorts of issues would lead to cementing of family relationships for mutual support. I am satisfied that that is what has occurred here.

15. If the claimant has to go back to Zimbabwe then, under preserved findings, she will not have support there. I accept that certain of the UK-based family members would be able to send her financial support but I am talking, here, about emotional support. Having had such support for many years in the UK the sudden absence of it is likely, in my judgment, to impact upon her to a significant extent.

16. In my judgment the coming together of a number of material factors encompassing the claimant's health situation and emotional needs stemming from it, her long-term residence (albeit mostly illegal) in the UK and more particularly her strong relationships with UK-based family members and the impact upon not having those persons in close proximity if she were to be returned to Zimbabwe, operate to constitute to exceptional circumstances sufficient to outweigh the interests of immigration control and the various other countervailing factors I have identified above. That means, therefore, that this is one of those rare cases where the claimant is able to (and does) succeed under Article 8 of the ECHR outside the Rules.

17. In light of the above, in remaking the decision I allow the claimant's appeal on Article 8 ECHR grounds outside the Rules, from the decision of the Secretary of State of 25 August 2017 refusing to grant her leave to remain.

18. Finally, I have granted the claimant anonymity. The tribunal itself did so and I continued that grant when making my decision to set aside the tribunal's decision. There are, in this case, sensitive circumstances including the claimant's HIV-positive status which she understandably would wish to keep as private as possible.

Decision

The decision of the First-tier Tribunal has already been set aside.

In remaking the decision, I allow the claimant's appeal from the Secretary of State's decision of 25 August 2017 on human rights grounds (Article 8 of the ECHR outside the Rules).

The claimant was granted anonymity by the First-tier Tribunal. I continue that grant pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall name or otherwise identify the claimant or any member of her family. Any breach may lead to contempt of court proceedings.

Signed: Dated: 18 September 2019

Upper Tribunal Judge Hemingway