Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/31292/2014**

THE IMMIGRATION ACTS

Heard at Field House, London **Decision & Reasons Promulgated**
On the 19th August 2015 **On the 4th September 2015**

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MS EMMAH LESA
(Anonymity Direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Kannangara (Counsel)
For the Respondent: Ms Everett (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-Tier Tribunal Judge Owens promulgated on the 16th March 2015.

Background

2. The Appellant initially entered the United Kingdom on the 1st October 2007 with Entry clearance as a student. Thereafter she was granted further periods of Leave to Remain until the 21st March 2014. On the

17th March 2014 she submitted an application for Leave to Remain in the United Kingdom on basis of her medical condition, which initially was considered by the Respondent both under Article 3 and Article 8 of the ECHR in a decision dated the 22nd July 2014. The Respondent initially refused the Appellant's application on Human Rights grounds. The Appellant then appealed that refusal to First-tier Tribunal and that appeal was heard by First-Tier Tribunal Judge Owens on the 10th February 2015, sitting at Richmond. In her decision she found that it had been confirmed on behalf of the Appellant that she did not meet the requirements of paragraph 276ADE of the Immigration Rules and that it was not being argued that the Appellant could succeed under Article 3.

3. The First-tier Tribunal Judge found that the Appellant was not critical or terminally ill and that her condition remained stable on medication and that therefore she did not meet the requirements of Article 3 and that her removal would not amount to a breach of her Human Rights under Article 3. The First-tier Tribunal Judge then considered the Appellant's claim under Article 8 of the ECHR. She concluded that the decision taken represented a proportioned interference with the Appellant's private life and that there was no breach of her human rights under Article 8.

4. The Respondent has appealed against that decision to the Upper Tribunal and permission to appeal was granted by Judge of the First-Tier Tribunal Hollingworth on the 21st May 2015, on the grounds that:

i. "An arguable error of law has arisen in relation to the consideration of Article 8. At paragraph 66 the Judge has stated that ultimately the Appellant did not satisfy the Immigration Rules in respect of private life. The Judge went on to state that she found that Article 8 did not provide a remedy for those who could not satisfy the Rules.

ii. Given this reference appearing at this juncture of the decision it is arguable that the Judge's approach to the application of the criteria appertaining to Article 8 outside of the Immigration Rules has been affected."

Submissions

5. Mr Kannangara on behalf of Appellant relied upon the Grounds of Appeal. He argued that the First-Tier Tribunal Judge materially erred in law in her consideration of the proportionality issue at the 5th stage of the Razgar test. He referred me specifically to paragraphs 65 and 66 of the decision and argued that the First-tier Tribunal Judge's finding that, "I find that Article 8 does not provide a remedy for those who cannot satisfy the Rules" amounted to a material error in law in her assessment of the Appellant's claim under Article 8. He argued that the case law following Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin) had made it clear that situations could arise where Appellants would succeed in respect of their Article 8 claim outside of the Immigration Rules, even if they did not meet the requirements of the Immigration Rules and that the First-tier Tribunal Judge had placed too much weight, when considering the public interest element in the Respondent's side of the balancing exercise, on the fact that the Appellant did not meet the requirements of the Immigration Rules. He asked me to allow the appeal on the basis there was a material error of law in this regard.

6. Ms Everett on behalf of the Respondent relied upon her Rule 24 response and argued that the First-Tier Tribunal Judge had fully considered the Appellant's claim under Article 8 and all of the considerations that were relevant to the balancing exercise. She argued that Judge Owens had properly taken account of section 117B of the Nationality, Immigration and Asylum Act 2002 and that although the wording of paragraph 66 was "unhelpful" she argued that the Judge had still given the proper consideration as to the factors to be balanced for the purpose of determining whether or not the decision was proportionate under Article 8 and that in any event, even if the Judge had erred in law, such error was not material as there were no grounds of finding that the decision would have amounted to a breach of the Appellant's Human Rights under Article 8.

My Findings on Error of Law and Materiality

7. First-Tier Tribunal Judge Owens properly set out the five-stage test pursuant to the House of Lords decision in Regina v. Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent [2004] UKHL 27 at [50] and properly considered that in line with the Court of Appeal case of GS (India) and others v The Secretary of State for the Home Department [2015] EWCA Civ 40 that the failure of the Appellant's claim under Article 3 on health grounds did not necessarily entail failure under Article 8, but that Article 8 could not prosper without some separate or additional factual element which brings the case within the Article 8 paradigm. The First-tier Tribunal Judge went on to consider the factors set out at section 117 B of the Nationality, Immigration and Immigration Act 2002 and noted that the Appellant did speak fluent English having been educated in English to Masters level and that she has been financially independent [64]. The First-Tier Tribunal Judge further at [65] found that the Appellant's private life had been built up a time when her status was not precarious and she said that she gave the Appellant's private life a lot of weight and had taken into account that she had carried out charity work and assisted more vulnerable people in the community [65].

8. However, although having properly considered the factors weighing in favour of the Appellant for the purposes of considering the proportionality issue, sadly, it seems clear, reading the Judge's decision at [66] that the First-Tier Tribunal Judge did err in law in finding that, "ultimately however the Appellant does not satisfy the Immigration Rules in respect of private life. I find that Article 8 does not provide a remedy for those who cannot satisfy the Rules." Further at paragraph [16], Judge Owens found that "Although I have found the Appellant has made strong private life ties to the UK over the time she has lawfully spent here, I find that she cannot meet the requirements of the Rules and there is no good reason why it is not reasonable to expect her to resume her life in Zambia." The First-Tier Tribunal Judge's findings in this regard clearly indicate that she has in fact placed too much weight in carrying out the balance exercise, on the fact that the Appellant could not meet the requirements of the Immigration Rules and has considered that the Appellant's failure to satisfy the requirements of the Immigration Rules precludes her from

a finding that the decision is not proportionate to the legitimate public aim sought to be achieved. It is an error of law to state that "Article 8 does not provide a remedy for those who cannot satisfy the Rules."

9. Clearly, Article 8 is not a general dispensing power and cannot be used simply to circumvent the provisions of the Immigration Rules, but if there are compelling circumstances that are not dealt with under the Immigration Rules, then a decision by the Respondent to remove an Appellant can still amount to a breach of her Human Rights under Article 8 and the decision taken can still be disproportionate. It is a matter of balancing, in order to determine whether or not the interference is proportionate to the legitimate public aim sought to be achieved.

10. In my judgement, the First-Tier Tribunal Judge's finding that "Article 8 does not provide a remedy for those who cannot satisfy the Rules" clearly amounts to an error of law. Further, given that this finding appears from her decision to be the basis on which it is said that the decision taken was proportionate, despite the Judge's findings regarding the exceptional circumstances in the Appellant's case that required consideration of her claim under Article 8 in respect of her very strong ties and her health condition, I find that the error of law is material. It is simply wrong to suggest that an Appellant cannot succeed, irrespective of the strength of the ties, if she does not meet the requirements of the Immigration Rules. I therefore find that the entirety of the First-Tier Tribunal Judges decision in respect of the proportionality issue has been infected by the error of law, and it is impossible to separate out this finding from her other findings in respect of proportionality, in order to say whether or not she would have reached the same decision irrespective of the error. The error having infected the entirety of her proportionality assessment, I find that the decision on the Article 8 issue cannot stand and is thereby set aside.

11. As there has not been an adequate consideration given as to the factors that might count against the Appellant in terms of the decision being proportionate to the legitimate public aim sought to be achieved, other than her simply not meeting the requirements of the Immigration Rules, and given that I have not had the benefit of

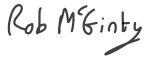
hearing directly from the Appellant herself regarding her links with the church, her friends and her charity work, Judge Owen simply having found she had strong ties in this regard, I consider that a substantial amount of further fact-finding would in fact be required by the Upper Tribunal involving in effect a complete remaking of the weight to be given to each of the factors regarding proportionality, in order to properly carry out the balancing exercise, that it is appropriate given the material error of law for the case to be remitted back to the First-tier Tribunal in Richmond, to be heard before any judge other than First-Tier Tribunal Judge Owens.

Notice of Decision

The decision of First-Tier Tribunal Judge Owens did contain a material error of law and is thereby set aside and the appellant's appeal is allowed. The case is remitted back to the First-Tier Tribunal for rehearing, to be heard at Richmond before any First-Tier Tribunal Judge other than First-Tier Tribunal Judge Owens.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed



Deputy Upper Tribunal Judge McGinty Dated 19th August 2015