Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04902/2019

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On the 27 November 2019	**On 18 December 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AGATHA [M]

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ogunbiyi, instructed on behalf of the Appellant
For the Respondent: Mr Mills, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal (hereinafter referred to as the "FtTJ") who in a decision, promulgated on the 24th July 2019 dismissed her appeal against the decision to refuse her human rights claim. Permission to appeal was granted on the 13th September 2019.

2. The background to the appeal is set out in the decision of the FtTJ and the decision letter issued by the Secretary of State. The appellant is a citizen

of Malawi. At the age of three she moved to Zimbabwe with her mother and lived there with her mother and two siblings (her brother and sister). The appellant's mother left Zimbabwe in 2000 with her brother. The appellant and her sister remained in Zimbabwe living with the appellant's grandmother. The appellant's mother had entered the United Kingdom as a visitor. It is recorded that she received a telephone call from her mother in Zimbabwe advising her not to return and she decided to remain in the United Kingdom illegally. She also made a claim for asylum in 2009 using what was effectively her Zimbabwean identity.

3. The appellant and her sister came to the United Kingdom on 16 December 2003 on a visitor's Visa. Each of them was travelling on Malawian passports. Their entry to the United Kingdom was made possible with the assistance of their father who was at the time the Malawian High Commissioner to the United Kingdom. It is said that her father contacted the Malawian embassy in Zimbabwe following which the appellant and her sister were issued with a letter confirming their status and following this they were able to enter the United Kingdom. At the time of her entry to the United Kingdom she was 18 years of age and enrolled in school. She completed her A-levels and then enrolled with a university. She has also enrolled in further courses and graduated in 2013 and thereafter obtained paid employment.

4. On 9 January 2015 the appellant was convicted for possession of a passport with a full indefinite leave to remain vignette, contrary to section 4 of the Identity Documents Act 2010 and fraud by false representation contrary to section 2 of the Fraud Act 2006.

5. There is a copy of the sentencing remarks in the papers before the Tribunal. It demonstrates that the appellant was a co-defendant alongside her mother and that both the appellant and her mother were convicted after a trial before a jury. It was as a result of the counterfeit endorsement which allowed the appellant to remain in the United Kingdom to live, study and work. The appellant was sentenced to 6 months imprisonment on each offence to run concurrently and that the sentence would be suspended for a period of 12 months. There were two requirements attached to the suspended sentence order; first the requirement of residence and a requirement that she should be subject to a curfew requirement.

6. On 2 July 2015 she made a human rights claim for leave to remain in the United Kingdom. It was refused on the 16 August 2016 and was certified as clearly unfounded with an out of country appeal. Following proceedings for judicial review of that decision, on the 31 July 2018 the decision was quashed by a consent order made by the Court of Appeal and remitted to the respondent to take a fresh decision. There is a copy of the consent order in the papers. It states that the proceedings for judicial review challenging the certification of the appeal was refused at an oral hearing however, on 18 February 2018 the Court of Appeal granted permission on

the basis that although the appellant "has an unattractive immigration history, the Secretary of State may arguably have failed properly to take into account the fact that her sister is in the UK". The consent order with its reasons makes it plain that the Secretary of State had based its decision on an incorrect factual premise as the decision letter stated that the appellant's witness statement of 15 June 2015 "makes it clear that your sister is currently living in Malawi and would thus be able to assist in your integration". As it had been since clarified in a judicial review claim form that her sister was only Malawi temporarily to obtain a Visa to come back to the United Kingdom as a spouse of a British citizen. It is recorded that the "Secretary of State accepts that he erred in the decision by regarding this as a "clear" statement that the appellant's sister was living in Malawi. As the article 8 ECHR balance carried out in the decision was predicated on this mistaken belief that the appellant sister was living in Malawi and therefore available to assist the appellant's integration on return, the Secretary of State accepts that the matter should be reconsidered in a fresh decision."

7. The application made in July 2015 was refused in a decision letter issued on 1 March 2019. The respondent set out the appellant's immigration history and considered her claim in the context of her factual circumstances. She could not meet the suitability requirements as it was considered that her presence in the United Kingdom was not conducive to the public good by reasons of her conviction on the 9th June 2015 ; she could also not meet the eligibility immigration status requirement as she was currently in the UK without leave. As to her private life, this was considered under paragraph 276 ADE, and that in the light of her period of residence since 2003 she could not meet paragraph 276 ADE (1) (iii) nor (vi) on the basis that there were no very significant obstacles to her integration to the country to which she would have to go if required to leave the UK. In this respect, the respondent set out that the appellant had spent the majority of her life outside of the UK in Malawi and Zimbabwe and whilst she stated that she could not speak any of the languages of Malawi, she could speak English which is the official language of Malawi. As she had stated that her father lived in Malawi, and although she also stated that she had little contact with him, there was no evidence that he would be unwilling to assist her.

8. The respondent considered whether there were circumstances which lead to unjustifiably harsh consequences for the appellant in order to demonstrate that a grant of leave was appropriate. However, the respondent concluded that there were no such circumstances taking into account her immigration history and that she had established a private life in the knowledge that she had no lawful basis of stay having entered as a visitor which expired in 2004, her status in the UK was on a temporary basis and that there was no legitimate expectation that she could remain. It was noted that she had resided in the UK unlawfully using a false indefinite leave to remain vignette and was sentenced to a suspended sentence of imprisonment of 6 months(suspended for 12months)

alongside a curfew requirement and electronic tagging. She had spent the majority of her life outside the UK in Malawi and Zimbabwe and it was not accepted that she could not re-establish a family and private life in Malawi. It had been stated that her father lived in Malawi and although it was aimed that she had little contact with him, no evidence had been provided that he would be unwilling to provide assistance. It was considered that she had unlawfully worked and studied in the UK and the qualifications gained would assist her on obtaining employment on return. As regards her family members, she could maintain contact with them using modern methods of communication. It was also noted that her mother had no leave to remain and could return to Malawi with her. She was also able to speak English which was the official language of Malawi. The application was therefore refused.

9. The appellant sought to appeal that decision and the appeal came before the FtTJ on 11 June 2019. In a decision promulgated on 24 July 2019, and after hearing the evidence of the appellant, her mother, and a witness called on her behalf he dismissed the appeal.

10. The appellant sought permission to appeal that decision. Permission to appeal was granted on 13 September 2019.

11. Thus, the appeal came before the Upper Tribunal. I heard submissions from each of the advocates.

12. Mr Ogunbiyi, who appeared on behalf of the appellant before the FtTJ, relied upon the written grounds and in addition made the following oral submissions which I summarise below.

13. He submitted that there had not been a proper assessment of the appeal and that the evidence before the FtTJ was that the appellant last lived in Malawi when she was aged three (30 years ago) and that there was evidence that the appellant had no contact with her father set out in her witness statement at paragraph 11 where she stated that she had no relationship with him and was in no position to expect any help as he had not given any help in the past 33 years of her life. At paragraph 15 her witness statement made reference to her sister who was forced to go to Malawi to apply for a spouse Visa and that as she was estranged from their father and there were no family members she had to stay at a hotel. When her application was refused she had to ask a husband to come to Malawi to support her as she was lonely and isolated. He also referred to the evidence given by Mr M, in his witness statement filed 20/5/19, he stated that the appellant “does not have a good relationship with her father who resides in Malawi. She barely talks about and when she does, she does not have much to say she barely knows him or talk to him.” Therefore the finding at [32] in which the judge did not accept that the appellant had no contact with the father or that he would assist his daughter if she were returned to Malawi had no evidential basis in light of the evidence from the appellant and her witness Mr M.

14. He submitted that the judge failed to take into account the evidence given by the appellant relating to her sister who had gone to Malawi to obtain entry clearance but had lived in a hotel and did not stay with any family members. That was an explanation accepted by the SSHD. He submitted that the judge gave no reasons for rejecting the evidence and if we did give a reason at [33] it was speculative.

15. Mr Ogunbiyi also submitted that the factual recitation set out by the judge at paragraph 13 was wrong (which made reference to her father contacting the embassy in providing a letter enabling both the appellant and her sister to enter the United Kingdom). He submitted that in any event it was speculative to state that something which happened 15 years ago would mean that he could do that at the date of the hearing.

16. At [39], the FtTJ made reference to the evidence of the appellant's mother who had said she had no information about the appellant's father. Mr Ogunbiyi submitted that the judge gave no weight to her evidence, not as a result of any inconsistency but based on the fact that she was an untruthful witness having been convicted of criminal offences and that this was an improper basis upon which to reject the evidence. The judge should have considered the factual context that the mother had separated from her husband 30 years before and there'd be no contact between them.

17. The grounds also assert that the judge was wrong to make adverse findings based on the appellant's sister's absence at the hearing at paragraphs [33- 34]. The tribunal had been informed that she had given birth to a child at the hearing which had been adjourned when a list of witnesses had been sought from the people who provided statements. The appellant sister was not included in the list. The judge did not ask any questions in relation to the child's birth and was wrong to reach the conclusion needed based upon "unfounded suspicion". In his oral submissions he stated that she could not give evidence because she had difficulties and that she had completed a statement previously. He further submitted that whilst the judge had stated that the sisters evidence would have been useful there was evidence given by the appellant and also by Mr M concerning contact with the appellant's father therefore his view of the sister's absence affected the FtTJ's judgement.

18. He submitted that the judge failed to carry out a proper proportionality test by failing to take into account that she had left Malawi at the age of three, that she did not speak the language, she had no contact with her father who was living there and would find it difficult to live in Malawi, she had no connections there and that they taken together were "very significant obstacles to her reintegration" and that the judge failed to apply this objectively on the facts which were not disputed. The judge had speculated about the father's position and the appellant's father was not a career diplomat and owed his ambassadorial post to his political affiliation.

Therefore there is no evidence to conclude that the appellant's father with supporter but there was evidence to the contrary, set out in the appellant's evidence, the sisters evidence, evidence in the reasoning of the Court of Appeal and her mother's evidence.

19. Mr Ogunbiyi submitted that the judge failed to take account of the sentencing remarks and that the appellant was under the full control of her mother when the offence was carried out and that she was 18 years of age when she entered and that no one had told her that she had no right to be in United Kingdom. He submitted the sentencing remarks did not show that she contrived in the offences but that she had turned a blind eye. The Secretary of State was required to consider the public interest in the light of a conviction in the judge in his sentence remarks did not find that her criminality was at a high level.

20. The judge also failed to take into account the evidence of her supporting witnesses who made reference to her employment, her education and general character references. The only reference to that evidence is at [40]. Consequently the judge undertook a flawed proportionality exercise and that the appeal should be allowed.

21. Mr Mills, senior presenting officer appeared on behalf of the respondent. There is no rule 24 response.

22. He submitted that in essence the complaints made were a lengthy disagreement with an adequately reasoned judgement given by the FtTJ. Whilst the grounds took issue with the availability of help from the father, even if the appellant's father was not in Malawi, the appellant was a 34-year-old adult who had graduated from university. The argument advanced in behalf of the appellant that she had no contact with the father and therefore the appeal should be allowed failed to take account of the other parts of the evidence which included that she was an adult, she had graduated and there was no evidence to say that someone who was a single woman could not live in Malawi and that even if everything had been accepted it was open the judge to dismiss the appeal.

23. He submitted that the judge did not engage in speculation. The factual matters set out at paragraph 13 had been taken from the appellant's own application (see letter at A5) and that the appellants evidence was that the appellant's father who was the Malawian High Commissioner had arranged for them to have letters so that they could enter the United Kingdom as a visitors. Therefore he submitted on her own evidence her father assisted her 15 years ago. Whilst there were witnesses who said there had been no successful contact since then, this was not undisputed as counsel had suggested. Whilst there had been no presenting officer present the judge made reference to the Surendran guidelines at paragraph 4 which states that the respondent's absence does not mean that facts are proved therefore the judge was entitled to consider the evidence.

24. As to [39] it was open to the judge to make those findings concerning the appellant's mother's evidence. She had been convicted of a serious fraud and the judge was entitled to consider the appellant's credibility which was "zero credibility in light of her conviction. The appellant said she had no contact with her father, but that evidence was also tainted by her conviction. As to the submissions made about her sentence, counsel cannot go behind that conviction and at the time false ILR was purchased it was used to gain university education at a time when she was an adult. Whilst she stated that she did not know about this, that was an argument put before the jury which they rejected. Therefore the only thing that she had produced had been the oral evidence, the judge was entitled not to place weight upon it.

25. As to her sister's evidence, the judge was entitled to take account of her absence. She was a witness who could contribute to the evidence because she went to Malawi to obtain entry clearance and whilst she was there she was able to get the contact details of her father. We do not know what the contact details were, but it was recorded at [33] that the appellant's evidence in court was that her sister was the one who was able to get her father's contact details and pass on to the appellant. Therefore the inference is that the appellant's sister knew where her father was that she had not given evidence as to how she had got those details. This was obviously material evidence and she had produced a witness statement and there was no evidence provided in June that she could not come to court two months later and also no adjournment been sought. Mr Mills submitted that the burden was upon the appellant and when material evidence had not been provided and given its likely materiality, it was open to the judge to place weight on the absence of that witness.

26. Mr Mills also observed that in the submissions made by Mr Ogunbiyi he stated that the appellant's father was not a career diplomat and was a friend of the president however there was no evidence to support any of that. The FtTJ had not speculated as to the position of her father and was entitled to place little weight on the evidence of Mr M (at [40]), given that he had given no details other than reporting what the appellant had said.

27. In terms of the rules, he submitted very significant obstacles reintegration required a high threshold which the judge was well aware of at[19]. She had continuing links in Malawi to her father and that there was a likelihood that he was someone who could assist her, at[36] she was an adult who had had employment in the United Kingdom and therefore could find employment in Malawi and he rejected Counsel's "bald assertion" as a limited or no employment opportunities in Malawi, at [37] she spoke English which is the main language in Malawi and had a high level of education from the United Kingdom which would increase her prospects of employment on return. Therefore the judge found that the appellant had not made out her case that there were very significant obstacles to her reintegration and at [41], reached the conclusion that there were no

unjustifiably harsh consequences for the appellant, which is the correct test therefore having looked at the matters outside the rules and under the rules.

Decision on the error of law:

28. I have carefully considered the written grounds and the oral submissions of the parties and have done so in the light of the decision of the FtTJ. I am satisfied that the decision reached does disclose the making of an error on a point of law. I shall set out my reasons for reaching that decision.

29. The issue that the FtTJ had to decide was whether the decision made by the respondent was unlawful under section 6 of the HRA 1998. A court must accord "*considerable weight*" to the policy of the Secretary of State at a "*general level*": *Agyarko* paragraph [47] and paragraphs [56] - [57]; and see also *Ali* paragraphs [44] - [46], [50] and [53]. This includes the policy weightings set out in Section 117B. To ensure consistency with the HRA 1998 and the ECHR, section 117B must, however, have injected into it a limited degree of flexibility so that the application of the statutory provisions would always lead to an end result consistent with Article 8: *Rhuppiah* (ibid) paragraphs [36] and [49].

30. The test for an assessment outside the immigration rules is whether a "*fair balance*" is struck between competing public and private interests. This is a proportionality test: *Agyarko* (ibid) paragraphs [41] and [60]; see also *Ali* paragraphs [32], [47] - [49]. In order to ensure that references in the immigration rules and in policy to a case having to be "*exceptional*" before leave to remain can be granted, are consistent with Article 8, they must be construed as not imposing any incremental requirement over and above that arising out of the application of an Article 8 proportionality test, for instance that there be "*some highly unusual*" *or* "*unique*" factor or feature: *Agyarko* (ibid) paragraphs [56] and [60]. The proportionality test is to be applied on the "*circumstances of the individual case*": *Agyarko* (ibid) paragraphs [47] and [60].

31. As Mr Mills observed, the decision of the FtTJ is not structured in that way and whilst there is reference to that approach it was not applied in that way. However, the issue was whether despite its structure, the decision dealt with all matters of substance.

32. The decision letter set out that the appellant could not meet the immigration rules for a number of reasons; she could not meet the suitability requirements under S-LTR 1.6 as it was considered that her presence in the United Kingdom was not conducive to the public good in the light of her conviction and also that there were very significant obstacles to her reintegration to Zimbabwe and/or Malawi. The fact-finding of the FtTJ in relation to those two issues are not entirely straightforward. As to the suitability issue, there is no reference to any assessment in this

regard. Whilst there was reference made to the appellant's private life having developed in the UK at a time when her stay was "precarious" (although in fact it was unlawful residence), and that she was charged and sentenced (at [31]), there was no reference to the view taken of this either in line with her evidence or in light of the sentencing remarks. Whilst Mr Mills accepts that there is no reference to this, either when making an assessment under the rules or in the overall proportionality balance and submits that this can only be to the appellant's benefit, I would agree in general terms. The issue of her conviction may weigh heavily on the public interest side of the proportionality balance. However, the issue arises that it is not known what view the FtTJ took about this. This is particularly so when considering the written and oral evidence of other witnesses who attended the Tribunal and gave evidence asserting the good character of the appellant since that conviction and her position in the community. The FtTJ at [40] considered the latter evidence only on the basis that they would support her if she were given leave in the UK and that it added little to whether she could be returned to Malawi. An assessment of the appellant's oral evidence and that of the witnesses concerning her conviction and her conduct since and seen in the light of the sentencing remarks was part of that evidential assessment which was not carried out. I cannot accept the submission made on behalf of the appellant that the sentencing remarks effectively exonerated her; they did not (see page 10 of AB) but nonetheless it was an issue which required consideration and analysis.

33. I also do not accept the submission made that the evidence of the supporting witnesses should have been given more weight when considering the content of their evidence relating to the appellant's father and her contact to him. As Mr Mills submitted, the written evidence of their knowledge of this issue was sparse. By way of example, the witness statement of Mr M made reference to the appellant not having a good relationship with her father. There was nothing beyond that in the witness statement. Therefore, having considered submissions made on behalf of the appellant, the FtTJ's finding at [40] could be said to be open to the FtTJ. However I am satisfied that when considering the issue of whether the appellant had contact with her father or whether there was strong inferential evidence concerning this, the FtTJ failed to make a full assessment of the evidence. There was evidence in the judicial review proceedings which made reference to the appellant's sister. It is important to properly consider those proceedings which are set out in the statement of reasons. The decision was quashed on the basis that the respondent had accepted that there was a material error of fact in the previous decision letter. It had made reference to the appellant's witness statement which the respondent interpreted as saying that her sister was currently living in Malawi and therefore the respondent considered that that was evidence to demonstrate that her sister would be able to assist with her reintegration. However the appellant later clarified that witness statement in the judicial review proceedings to state that her sister was only in Malawi temporarily to obtain a visa to enter the United Kingdom as a

spouse. Thus it was accepted by the respondent that it was factually incorrect to state that the appellant's sister was living in Malawi (see page 18 of AB). Whilst Mr Ogunbiyi refers to it being an unchallenged fact that the appellant's sister's stayed in a hotel it does not necessarily follow that she had no contact with her father but in any event the issue was not considered by the FtTJ .

34. A further evidential issue arises from the consideration of the appellant's mother's evidence. The FtTJ made a wholesale rejection of her evidence at [39] by stating that he did not accept evidence because he did not find her to be a truthful witness. Mr Ogunbiyi submitted that the FtTJ gave no reasons for rejecting her evidence, both written and oral evidence given, other than on the basis of her conviction. I would agree with the submission made by Mr Mills that it would be open to the FtTJ take as a starting point as an assessment of credibility her conviction and conduct as set out in the sentencing remarks. The FtTJ did make reference to this as a starting point, however, as she had given oral evidence alongside short written evidence, it was incumbent on the FtTJ to give reasons to why he rejected her evidence beyond that conviction. There was no reference to the oral evidence that she had given although it may have been limited as to why he found her to be untruthful.

35. A further issue arises from the FtTJ's consideration of the evidence of the appellant's sister. She had made a witness statement for the proceedings dated 24 April 2019 but did not attend the hearing to give evidence. The FtTJ stated at [33] that the lack of attendance was "startling" and in relation to the reason given for her non-attendance at related to her pregnancy was an "extraordinary omission" from the witness statement. The grounds assert that the FtTJ was wrong to make an adverse finding on the sister's absence and the FtTJ did not ask questions about her child. Mr Ogunbiyi has now provided photos to show the appellant sister did give birth to a child although that does not explain why she did not attend the hearing which was in June. Mr Ogunbiyi refers to their being "difficulties" in his oral submissions but did not elaborate any further. In my judgement, the FtTJ's view that the appellant's sister was a witness of relevance was undoubtedly right -she had been to Malawi and would have had first-hand knowledge of the matters relied upon by the appellant and those in support of the submissions made by counsel. However I do not consider that the evidence could necessarily demonstrate that her absence should be taken as damaging to the appellant as the FtTJ found at [35] given that no further questions had been asked about her absence and that there was some evidence in the statement of reasons and the appellant's evidence on this issue.

36. For those reasons I am satisfied that the decision discloses the making of an error on a point of law and those issues may have been material to the outcome.

37. As to the remaking of the decision, in reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

38. As the errors are set out above relate to the assessment of evidence both oral and written evidence as well as to the overall proportionality balance, it is my view that it will be necessary when remaking the decision to make an assessment of that oral evidence alongside the written evidence from the witnesses called. Mr Ogunbiyi referred to matters in his submission such as the profile of the appellant's father (see grounds at [ii]) which did not feature in the evidence but may have some relevance. Also the FtTJ made reference to the appellant's evidence given at [33] which made reference to her sister being able to pass on her father's contact details. It is not said in what context that evidence was given or why. Other issues set out above refer to evidence. I have therefore concluded that it is in the interests of fairness and justice for the appellant that the appeal should be reheard, and I have reached the overall conclusion that it requires the consideration of all of the evidence, for findings of fact to be made and the most appropriate venue for this is the First-tier Tribunal.

Notice of Decision

39. The decision of the First-tier Tribunal did involve the making of an error on a point of law and the decision shall be set aside and be remitted to the First-tier Tribunal for a hearing.

Signed Upper Tribunal Judge Reeds Date 16/12/2019

Upper Tribunal Judge Reeds