ASYLUM AND IMMIGRATION TRIBUNAL

MM (Tier 1 PSW; Art 8; "private life") Zimbabwe [2009] UKAIT 00037

THE IMMIGRATION ACTS

Heard at: Columbus House, Newport Date of Hearing: 17 July 2009

Before

SENIOR IMMIGRATION JUDGE GRUBB
IMMIGRATION JUDGE S J HALL

Between

MM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Aslam, Duncan Moghal Solicitors.
For the Respondent: Mr C Howells, Home Office Presenting Officer

1. Whilst respect for 'private life' in Art 8 does not include a right to work or study per se, social ties and relationships (depending upon their duration and richness) formed during periods of study or work are capable of constituting 'private life' for the purposes of Art 8.

2. In determining a Tier 1 (post-study) worker case where Art 8 is relied upon, the 5-stage approach in Razgar should be followed.

3. When determining the issue of proportionality in such cases, it will always be important to evaluate the extent of the individual's social ties and relationships in the UK. However, a student here on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met. Also, the character of an individual's 'private life' relied upon is ordinarily by its very nature of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK. In that respect, 'private life' claims of this kind are likely to advance a less cogent basis for outweighing the public interest in proper and effective immigration control than are claims based upon 'family life' (or quasi-family life such as same-sex relationships) where the

relationships are more likely to be unique and cannot be replicated once the individual leaves the UK.

DETERMINATION AND REASONS

1. The Appellant is a citizen of Zimbabwe who was born 17 April 1970. On 16 February 2009, the Respondent refused her application for an extension of leave to remain as a Tier 1 (Post-Study Work) Migrant under paragraph 245Z of Statement of Changes in Immigration Rules (HC 395). On 16 April 2009, a panel of the Tribunal (DIJ D N Bowen and IJ Y J Jones) dismissed her appeal. On 11 May 2009 SIJ McKee ordered reconsideration. Thus, the matter came before us.

2. The Appellant came to the United Kingdom on 24 April 2002 as a student. On 1 April 2004, the Appellant's husband and daughter, who was born on 17 September 1995, joined the Appellant in the UK as her dependents. The Appellant's daughter has been in school in the UK since 2003, when she was aged 8. She is now aged 13 and in secondary school. In August 2005, the Appellant's husband died.

3. Since arriving in 2002, the Appellant has been a student undertaking a number of courses with leave culminating in a BA (Hons) degree in Youth and Community Studies at the University of Wales, Newport between September 2005 and June 2008. She was awarded a 2.2 degree in December 2008.

4. During her time as a student and subsequently, the Appellant has undertaken both paid and voluntary work. Since 2006, the Appellant has been employed through the charitable organisation 'Rethink' as a Community Health Worker (CHW) for the Severnside Service in South Gloucestershire for 18.75 hours per week. She carries out voluntary work for the Bristol Youth Offending team and has been involved in the activities of her local church, St Matthews in Bristol. The Appellant wishes to continue her work as a CHW on a full-time basis if granted leave under the Tier 1 scheme.

Paragraph 245Z, HC 395

5. Prior to her leave expiring on 31 January 2009, the Appellant applied for further leave as a Tier 1 (Post-Study) Worker. The Respondent refused her application. That refusal was on the basis that a number of the requirements of para 245Z were not met but, before the Panel, the Respondent relied only upon para 245Z(e) namely that:

> "The applicant must have a minimum of 10 points under Appendix C."

6. Those 10 points were necessary for her to succeed under the Points Based System (PBS). Appendix C deals with the 'maintenance' element. Appendix C provides so far as relevant:

> "3. The applicant must have the funds specified in paragraph 2 above at the date of the application and must also have had those funds for a period of time set out in the guidance specifying the specified documents for the purposes of paragraph 2 above."

7. Paragraph 2 of Appendix C, in turn, specifies the amount as £800. The UK Border Agency's Guidance, *Tier 1 (Post-Study Work) of the Points Based System – Policy Guidance* (in the version applicable to this appeal) specifies that the £800 of personal (cash) savings must be held by the individual for a three month period prior to the date of application. The Guidance further specifies (at para 96) the documents which are required to establish this; including a letter or bank statements from a UK bank or a letter from a financial institution regulated by the FSA or, in the case of an overseas account, a letter from the official regulator of that country confirming the funds held in the applicant's account. All documents must be originals and not copies (para 93). The documents (or in the case of UK bank statements the most recent) must be dated no more than one calendar month before the application.

8. Before the Panel, the Appellant relied upon sums of money held in three UK bank accounts over the relevant period of 2 October 2008 to 2 January 2009 (when the application was made) showing a combined balance of £454.32. That obviously was not sufficient to meet the Rules and Guidance. In addition, she relied upon a letter dated 16 March 2009 from the FBC Bank Ltd in Zimbabwe which stated that as at that date the balance of an account in the Appellant's name was US $300. Finally, she relied upon a letter dated 19 March 2009 from the Great Zimbabwe Realtors that they were in possession of US $750 between 30 September 2008 and 31 January 2009 which they held for the Appellant being rent collected by them in respect of a property owned by the Appellant. Taken together the Appellant claimed she had at least £800 available to her as required.

9. The Panel concluded that the Appellant's documentation did not comply with the Guidance. At para 21, the Panel said this:

> "…we cannot accept the letters from the FBC Bank Limited and GZR as acceptable evidence of the amount held by the appellant in Zimbabwe as they were submitted after the application. The evidence from GZR did not come from a personal bank or building society statement and the evidence from FBC Bank Limited showed a balance on a particular day after the requisite period and did not show that the appellant held enough funds for the requisite period. We therefore find that the appellant did not satisfy the maintenance requirement to allow her to remain in the UK as a Tier 1 (Post Study Work) Migrant."

10. Before us, Mr Howells on behalf of the Respondent submitted that the Panel's approach to the documentary evidence was entirely in line with the Tribunal recent decision of NA & Others (Tier 1 Post-Study work-funds) [2009] UKAIT 00025. There was no material error of law in the Panel's decision. Ms Aslam, for the Appellant, informed us that she was instructed to pursue the reconsideration on this issue but then made no specific submissions to us.

11. In our judgment, the Panel's decision was inevitable and correct. In relation to the letter from FBC Bank Limited we entirely agree with the Panel that this document did not in any way assist the Appellant. It merely states that the Appellant's account at that bank had US $300 in it on 16 March 2009. It says nothing about what, if any, of these funds were available to her over the relevant three month period prior to her application in January 2009 as required by the UK Border Agency's Guidance.

12. By contrast, as the Panel accepted, the letter from Great Zimbabwe Realtors dated 19 March 2009 did show that she had US $750 available over the relevant period. However, they placed no reliance upon it, inter alia, because it post-dated the application. With respect that is not correct. As the Tribunal pointed out in NA (at [66]-[67]), the effect of s.85(4) of the Nationality, Immigration and Asylum Act 2002 is that the Tribunal may take into account evidence on appeal that was not submitted with the application (or indeed which post-dates it) providing that the evidence relates to the funds available during the three month period prior to the application. That is precisely what this letter did. The Panel was, nevertheless, correct not to take the document into account because it does not fall within the documentation required by the Guidance. It relates to an "overseas account" (albeit not a personal bank account) and there is no letter from the "home regulator" in Zimbabwe confirming the funds as required by para 96(iv) of the Guidance. The Guidance is mandatory and only the specified documents will suffice to prove the requisite funds were held by the Appellant (NA at [47] and [51]).

13. Consequently, for reasons which differ only slightly from those of the Panel, we agree that the two documents relied upon by the Appellant did not fall within the Guidance and thus the Panel were right to conclude that the Appellant had failed to show that she had £800 available to her in the three months prior to her application. For these reasons, the Panel's decision to dismiss the appeal in respect of para 245Z discloses no material error of law and must stand.

14. At the conclusion of the case Mr Howells pointed out that the appeal before the Panel had proceeded on a false premise. Because the Appellant had a dependent child, the amount of cash funds which she had to have available was not £800 (as had been the common ground between the

parties) but, in fact, £1333 to reflect an additional element of £533 for each dependant). He referred us to the UK Border Agency's, *Points Based System (Dependants) – Policy Guidance* at para 30. Ms Aslam did not challenge this. We are grateful to Mr Howells for drawing this to our attention. It is unfortunate that the Panel was not referred to the relevant Guidance. Had this been drawn to the Panel's attention, it is clear that the Appellant could not have established she had that amount in funds available to her even if the two documents she relied upon should have been taken into account. The main point at issue in the appeal simply did not arise.

Article 8

15. In addition to dealing with the Appellant's claim under the Immigration Rules, the Panel considered whether the Respondent's decision breached the Article 8 rights of the Appellant and her daughter (aged 13) who lives with her in the UK. The latter's rights are to be taken into account following the House of Lords' decision in Beoku-Betts v SSHD [2008] UKHL 39.

16. At para 22 of their determination, the Panel concluded that there would be no interference with their family life as that could be resumed in Zimbabwe and, in any event, it was not disproportionate to require the Appellant and her daughter to return to Zimbabwe to resume their family life.

17. The Panel's conclusion in respect of the Appellant and her daughter's family life is, perhaps, not surprising. Ms Aslam submitted, however, that the Panel erred in law in focussing exclusively upon family life. They wholly failed to consider the effect of removal upon the Appellant and her daughter's private life in the UK. That right was both engaged and breached in the circumstances of this case. In particular, she submitted that the Appellant's opportunity to gain post-study work experience and the effect upon her daughter of ending her schooling in the UK if she had to return to Zimbabwe engaged the right to respect for the private life of both the Appellant and her daughter.

18. Mr Howells accepted that Article 8 had been raised in the Grounds of Appeal before the Panel. He also accepted that the order for reconsideration did not preclude the Appellant from raising this issue. He submitted, however, that the circumstances did not engaged the 'private life' aspect of Article 8 because there was, in the circumstances, insufficient interference with it and, alternatively, that any breach was proportionate.

1. 'Private Life'

19. Article 8 of the ECHR is in the following terms:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

20. The correct approach to applying Art 8 was articulated by Lord Bingham of Cornhill in R(Razgar) v SSHD [2004] UKHL 27 at [17] in the now well-known 5-stage test:

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

21. In this appeal, there is no issue in respect of (3) and (4). The battleground is in relation to whether the decision interferes with the Appellant's (and her daughter's) protected right under Art 8 (issue (1)); whether that interference, if established, is sufficiently serious to engage Art 8.1 (issue (2)); and finally whether any such interference is proportionate to the legitimate aim of proper immigration control (issue (5)).

22. The scope of 'private life' and its content has not proved susceptible of precise and comprehensive definition. In Pretty v UK (Application no. 2346/02) (2002) 35 EHRR 1, the European Court of Human Rights offered the following 'broad' description (at [61]):

> " 61. As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22). It can sometimes embrace aspects of an individual's physical and social identity (see *Mikulic v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, for example, *B. v. France*, judgment of 25 March 1992,

> Series A no. 232-C, pp. 53-54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; and *Laskey, Jaggard and Brown*, cited above, p. 131, § 36). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

23. In R(on the application of the Countryside Alliance) v Attorney-General and others [2007] UKHL 52, Lord Bingham of Cornhill, having described the content of the right as "elusive" and one which "does not lend itself to exhaustive definition" characterised the essence of what is protected by Art 8 as follows (at [10]):

> "…the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose."

24. The two spheres of impact of the right to respect for private life are, therefore, in a sense, on the one hand, the right to keep the world out of one's own affairs (right to exclude) and, on the other hand, the right to be let into the world of others (the right to be included). Often appeals before the AIT are concerned with the former right, for example where an individual claims his physical and moral integrity will be affected by the decision as in health or suicide cases (see, e.g. Bensaid v UK (Application No 44599/98) (2001) 33 EHRR 205 and R(Razgar) v SSHD). This appeal is not concerned with that aspect of an individual's private life but rather with the "right to personal development, and the right to establish and develop relationships with other human beings and the outside world" (Pretty at [61]).

25. Clearly, it cannot be gainsaid that individuals normally develop relationships with others by living and engaging in society in the country where they live. It would be a rare and unusual case of social isolation for this not to be so. In Maslov v Austria (Application No 1638/03) [2009] INLR 47 the Grand Chamber of the ECtHR pointed out (at [63]) this potentially important aspect of 'private life' within Article 8:

> "63. … as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of

> "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect…."

26. Whilst, of course, the Court had in mind a "settled" immigrant, the point made there is a good one (albeit likely to be that much less powerful) in the circumstances of an individual with limited leave such as the Appellant.

27. In this appeal, however, the Appellant puts her Art 8 case in a narrower way. She argues that Art 8 is engaged because she has a 'right' to gain work experience and her daughter has a 'right' not to have her education (it is assumed) deleteriously affected by having to return to Zimbabwe with her mother. As regards the latter, the argument was not put on the basis of a 'right to education' within Art 2 of the First Protocol to the Convention. If it had been, establishing a breach of such a right would, in any event, not survive objective justification for a legitimate aim - in effect 'proportionality' - where the legitimate aim of immigration control was in play and education in her home country is available to the child (see R(Holub) v SSHD [2001] 1 WLR 1359, CA).

28. There is no doubt that the social ties and relationships actually formed in the work place and at school fall within the protected right to personal development accepted in the case law. But what of any wider right to work (or gain work experience) or study?

29. The ECtHR's case law gives some support to the view that aspects of an individual's working life can fall within Art 8. In Niemietz v Germany (Application No 13710/88) (1993) 16 EHRR 97 the Court said this (at [29]):

> "There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time."

30. The focus of the Court appears, however, to be on the relationships which are formed during a professional life and the connection between those and any others formed in the day-to-day life of an individual. In this sense, it is far from clear that the Court saw professional or working

activity itself as falling within the substantive content of an individual's 'private life'.

31. The Court came closer to the view which would bring professional or working activity *per se* within Art 8 in Sidabras v Lithuania (Application No 55480/00) (2006) 42 EHRR 6. The applicants had both worked for the Lithuanian branch of the KGB. After independence, the applicants worked for the Government as a tax inspector and a Government prosecutor. In 1999, as "former KGB officers" they became subject to employment restrictions imposed by Lithuanian legislation. They were both dismissed from their Government jobs and banned from working in the private sector until 2009. They claimed, inter alia, that their ban from finding jobs in the private sector breached Art 8 taken in conjunction with Art 14. By a majority (5-2) the Court held that the facts fell within the ambit of Art 8 and that there had been a violation of Art 14 taken in conjunction with Art 8. In respect of the ambit of Art 8, the majority, having cited Niemietz, said this (at [47]-[48]):

> "47…having regard in particular to the notions currently prevailing in democratic states, the Court considers that a far-reaching ban on taking up private-sector employment does affect "private life"….
>
> 48….Admittedly, the ban has not affected the possibility for the applicants to pursue certain types of professional activities. The ban has, however, affected the applicants' ability to develop relationships with the outside world to a very significant degree, and has created serious difficulties for them as regards the possibility to earn their living, with obvious repercussions on their enjoyment of their private life."

32. At [49]-[50] the Court continued:

> "49 The Court also notes the applicants' argument that as a result of the publicity caused by the adoption of the "KGB Act" and its application to them, they have been subjected to daily embarrassment as a result of their past activities. It accepts that the applicants continue to labour under the status of "former KGB officers" and that fact may of itself be considered an impediment to the establishment of contacts with the outside world - be they employment-related or other - and that this situation undoubtedly affects more than just their reputation; it also affects the enjoyment of their "private life". The Court accepts that Article 8 cannot be invoked in order to complain about a loss of reputation which is the result of the foreseeable consequences of one's own actions such as, for example, the commission of a criminal offence. Furthermore, during the considerable period which elapsed between the fall of the former Soviet Union (and the ensuing political changes in Lithuania) and the entry into force of the impugned legislation in 1999, it can reasonably be supposed that the applicants could not have envisaged the consequences which their former KGB employment would entail for them. In any event, in the instant case there is more at stake for the applicants than the defence of their good name. They are marked in the eyes of society on account of their past association with an oppressive regime. Hence, and in view of the wide-ranging scope of the

> employment restrictions which the applicants have to endure, the Court considers that the possible damage to their leading a normal personal life must be taken to be a relevant factor in determining whether the facts complained of fall within the ambit of Article 8 of the Convention.
>
> 50. Against the above background, the Court considers that the impugned ban affected, to a significant degree, the possibility for the applicants to pursue various professional activities and that there were consequential effects on the enjoyment of their right to respect for their "private life" within the meaning of Article 8."

33. It is important to note that the Court did not conclude that a violation of Art 8 had been established (see [63]). It did not need to consider that as it found a breach of Art 14 read in conjunction with Art 8. The Court was only concerned with whether the facts fell within the 'ambit' of Art 8. No issue of interference or, very significantly, the proportionality of any breach was considered by the Court. Further, the Court was concerned, as it emphasised, with an outright ban on employment. They were not denied the opportunity to engage in a particular job or for a particular employer. They simply had no place to work. Obviously influential was the 'stigma' and impact upon them of such a public ban. The nature of the ban and its considerable effect upon the applicants beyond preventing them working contributed to the Court's decision. Having said that, at least in these circumstances, the Court considered that the ban impacted upon aspects of the applicants' 'private life' under Art 8.

34. It would be premature and unwarranted to read Sidabras as establishing that a right to work (or enjoy work activity) is entailed in Art 8. Caution was certainly expressed by the House of Lords in the Countryside Alliance case. There, the House was considering a challenge to the ban on hunting imposed by the Hunting Act 2004. One of the challenges was based upon Art 8 and one strand of that challenge was that the ban interfered with huntsmen's 'private life' in that it effected a loss of their livelihood. The House of Lords unanimously rejected this together with the other human rights and EU law challenges to the 2004 Act. Referring to the decision in Sidabras, Lord Bingham of Cornhill took a very particular view of the facts of that case. He said (at [15(4)]):

> "Sidabras was a very extreme case on its facts, since the statutory consequence of employment as KGB officers some years before was disbarment from employment in very many public and private employments, and the applicants complained of constant embarrassment. Effectively deprived of the ability to work, the applicants' ability to function as social beings was blighted. Such is not the lot of the [human rights] claimants, to whom every employment is open save that of hunting wild mammals with dogs. But even on the extreme facts of Sidabras the court did not, as already noted, find a breach of article 8 but contented itself with finding a breach of article 14 in the ambit of article 8."

35. Given Lord Bingham's exacting view of the facts of Sidabras, any broader generalisation of the ambit of Art 8 would, in our judgment, be unjustifiable. Lord Hope of Craighead also expressed caution about the scope of 'private life' protected by Art 8 (at [54]):

> "[This case] is about the claimants' right to establish and develop relationships with other human beings and the outside world. But this right is protected only "to a certain degree": Niemietz v Germany (1992) 16 EHRR 97, para 29."

36. The reference to Niemietz and its relevance to aspects of an individual's work falling within Art 8 is perhaps particularly worthy of note.

37. How then should the threads of the jurisprudence and arguments be drawn together?

38. First, in Slivenko v Latvia (Application No 48321/99) (2004) 39 EHRR 156, the ECtHR acknowledged (at [95]) that:

> " …the case-law has consistently treated the expulsion of long-term residents under the head of "private life" as well as that of "family life", some importance being attached in this context to the degree of social integration of the persons concerned (see, for example, *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 88-89, §§ 42-45)."

39. Whilst the ECtHR in Slivenko referred to "long-term residents", its judgment cannot be so restricted. Those ties may arise – albeit with less cohesive force – for temporary visitors such as students or workers. They are an aspect of that individual's right to personal development and the right to establish and develop relationships with other human beings and the outside world (Pretty; Niemietz, Slivenko and Maslov). As the Tribunal observed in NA (at [105]):

> "….it is possible for a student in the course of his or her studies (and part-time working, if applicable) to have developed over time ties with the community that amount to significant elements of a private life within the meaning of Article 8 (a student may also have maintained or developed incidental family life ties here)…"

40. Thus, social ties formed whilst living in a community, working with others or studying at school or other educational institution are aspects of an individual's 'private life' within Art 8.

41. Secondly, however, that does not lead to the conclusion that a right to work or, as it is put in this case on behalf of the Appellant, the right to gain work experience in itself is embraced by the concept of 'private life' in Art 8. The caution expressed in the Countryside Alliance case regarding the ECtHR's decision in Sidabras strongly suggests that the Human Rights Court was concerned with a case which was "extreme…on its own facts". The impact of the ban on the applicants involved not only an inability to

work in any occupation but also resulted in constant public embarrassment. It may well be that the decision more appropriately resides within the category of Art 8 cases dealing with an individual's 'physical and moral integrity'. In our judgment, Sidabras should not, therefore, be taken to establish any general proposition that such a right is an aspect of 'private life' within Art 8. It would be wrong in cases of this nature to approach an appeal on the basis that the denial of leave to carry out post-study work engages Art 8 because the right to work or engage in that work in itself falls within the individual's 'private life' protected by Art 8.

42. Thirdly, the same caution should, in our judgment, apply if it is suggested that a right to study is itself part of the 'private life' of an individual. We have already noted the specific provision in Art 2 of the First Protocol to the ECHR specifically dealing with a 'right to education', itself subject to qualification on objective grounds and subject to a wide margin of appreciation.

43. We are not aware of any clear authority either European or domestic on this issue. What case law exists is equivocal. In OA (Nigeria) v SSHD [2008] EWCA Civ 82, the Court of Appeal held that the Tribunal had been correct to conclude that the claimant (a college student) had established a breach of her Art 8 right to respect for her private life if she were removed from the UK in the middle of an academic year. The Court of Appeal does not spell out clearly what precisely was her "private life" other than to refer to it as "her studies". It may be that the Court had in contemplation the social ties she had formed whilst studying. In our judgment the decision should not be over-read in setting the legitimate content of the phrase "private life" in Art 8. Likewise the Court's decision in favour of the claimant must be seen in the light of the Court of Appeal's subsequent view that it was "on any view an unusual case" as it involved a student who had done her best to comply with the Rules but had been misled and cheated by her advisors (SSHD v QY (China) [2009] EWCA Civ 680 *per* Sedley LJ at [25]).

44. More recently in SZ (Zimbabwe) v SSHD [2009] EWCA Civ 590 the Court of Appeal accepted that the claimant (a student) had established a private life in the UK. That view was based not upon any claimed 'right to study' but rather flowed from the claimant's "time and links" in the UK. The claimant had lived here for 6 years during which time she had become part of a church community and had been a student for 4 of those years. Having completed two computer courses, she applied for leave to undertake a 3 year diploma in health studies. By the time her appeal was heard she had instead been enrolled on a diploma course in psychology. Despite the claimant's argument that her removal would disrupt her education which she said she would be unable to pursue in Zimbabwe, the Court of Appeal concluded that on the facts the only conclusion properly

open to the Tribunal was that her removal was proportionate and no breach of Art 8 had been shown.

45. We should also refer to LL (China) v SSHD [2009] EWCA Civ 617 – a case relied upon by the Respondent and said to be antithetical to the application of Art 8 in a student case. It was argued that the effect of the AIT dismissing the claimant's appeal against a refusal to grant him leave under the 'long residence' provisions meant that he would be unable to complete his accountancy qualification. This, it was said on his behalf, engaged his Art 8 right to respect for private life. Laws LJ (at [16]) dismissed the argument as lacking any merit. He said:

> "I would not accede to this ground of appeal. The appellant has on the facts effectively no Article 8 case unless her desire to complete the ACCA course of itself provides her with one, but I do not see that Article 8 can fulfil that function, at least on the facts of this case."

46. Laws LJ went on to say that the proper course for the claimant in that case was to see further leave as a student. The upshot is, in our judgment, that the prospects for bringing a 'right to study' case within Art 8 are bleak.

47. Finally, the effect in appeals such as the present may not turn on the niceties of the ambit of Art 8. A Tier 1 migrant applicant such as this Appellant may not be able to argue that a decision refusing to extend her leave impacts upon her right to work or gain further work experience for the 2 years contemplated in such cases by para 245ZA if successful. Nevertheless she can argue that the decision impacts upon the positive obligation in Art 8 to respect her right to private life in the sense of maintaining or allowing to flourish her work and other social relationships during that period. In the case of a Tier 1 post-study work applicant that work may well have already begun on a part-time basis during her period of study. And, of course, there may well be aspects of her 'family life' which must also be considered.

48. In applying Art 8 in cases of this sort, the approach to be followed remains that set out in Razgar. The starting point is to determine whether and to what extent the individual has established 'family and private life' in the UK in order to engage Art 8 including any 'private life' through the social ties and relationships formed during periods of study and, if it is the case, during any periods of part-time work whilst a student (Razgar issue (1)). The duration and richness of the social ties will be important factors in determining the extent (if any) of an individual's 'private life' (note Pill LJ's reference in SZ (Zimbabwe) at [22] to the significance of "closer personal or social ties" and "close relationships" developed over time). Thereafter, the questions will be: whether the Appellant can establish that the decision affects her 'family and private life' sufficiently seriously to engage Art 8 (Razgar issue (2)); and, if so, whether that interference is justified (Razgar issues (3)-(5)), but in particular, we anticipate, usually the

principal issue will be whether that interference is proportionate to the legitimate aim of proper immigration control taking into account, for example, any delay (Razgar issue (5)).

49. In this case, we accept that the Appellant's private life will be affected by the Respondent's decision in that it will have an impact upon the professional and social ties she has established in the UK, including those at the work she has already undertaken as a Community Health Worker and as a volunteer with the Youth Offending Team in Bristol. We do not omit consideration of her broader social ties with the community but apart from those with her church none were specifically drawn to our attention. There will be an impact upon those professional and social ties if she has to return to Zimbabwe. They will cease. She will be denied further enjoyment of those relationships that she would otherwise continue, or form, during the period of leave she would have had for post-study work under the Tier 1 scheme. Likewise, we accept that the decision will have an impact upon the private life of the Appellant's daughter. She will cease to enjoy her social ties, in particular (as the case is presented to us) with others at her school.

50. To those aspects of the Appellant's Art 8 claim we add, of course, the family life that she maintains with her daughter in the UK.

2. Interference

51. Turning to the second issue in Razgar: will the interference "have consequences of such gravity as potentially to engage the operation of article 8"?

52. In AG (Eritrea) v SSHD [2007] EWCA Civ 801, Sedley LJ (at [28]) reminded us of the correct approach to this issue:

> "…while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one."

53. As we have already made clear, we accept that the social aspects of the private life of the Appellant and her daughter in the UK which are relied upon in this appeal will cease as a consequence of the Respondent's decision. That is the effect of removal. It will ordinarily be replaced by alternative private life enjoyed in Zimbabwe. However, that in our judgment is primarily relevant to the issue of the proportionality of removal. It cannot contradict the effect on the extent of interference with the private life of the Appellant and daughter in the UK which they currently enjoy and wish to enjoy in the future. In relation to the family life of the Appellant and her daughter, we entirely agree with the conclusion that the Panel reached namely that "they can resume their family life together in Zimbabwe" (at para [22]). It has never been

suggested otherwise. Indeed, it has always been the Appellant's case that she will return to Zimbabwe with her daughter after her post-work study. Thus, the principal focus of this appeal must be the 'private life' aspect of the individuals' Art 8 rights.

54. In the circumstances of this case, we are satisfied that the interference with the private life of the Appellant and her daughter crosses the minimum level of severity to engage Art 8.1. As Sedley LJ commented in AG (Eritrea) (at [28]):

> "Once the article is engaged, the focus moves…to the process of justification under art. 8(2). It is this which, in all cases which engage article 8(1), will determine whether there has been a breach of the article."

55. It is not suggested that the Respondent's decision does not further a legitimate aim, namely proper and effective immigration control. In our judgment, the proportionality of that decision is the key issue in this appeal.

3. Proportionality

56. The facts in this appeal are not in dispute. They may be gleaned from the bundle of documents submitted on the Appellant's behalf. We have the Appellant's statement dated 24 March 2009 which was before the Panel. The Appellant also gave oral evidence at the hearing. Though we cannot strictly take this into account unless we conclude that the Panel materially erred in law, in fact that evidence together with the Appellant's later statement of 15 July 2009 does not in any significant respect go beyond the evidence which was before the Panel.

57. The Appellant came to the UK in 2004 to study. She has done so ever since graduating from University of Wales, Newport at the end of 2008 with a degree in Youth and Community Studies. She has always had leave during her time in the UK. Her daughter (then aged 8) came to the UK with the Appellant's husband on 1 April 2004. Her daughter has been in school in the UK since around that time. Unfortunately, the Appellant's husband died in August 2005. The Appellant and her daughter, who is dependent upon her mother, have lived together since his death. The documentation in the bundle attests to the fact that the Appellant's daughter is settled and flourishing at school. Currently she is in year 8 at a secondary school in Bristol.

58. During her studies in the UK, the Appellant has undertaken paid and voluntary work, in particular in respect of the former as a Community Health Worker in Bristol for whom she works 18.75 hours a week and in respect of the latter for the Youth Offending Team in Bristol. It is full-time work as a CHW with her current employer that she wishes to pursue

under the Tier 1 scheme. There is no offer of employment before the Tribunal but the Appellant said that they wished to employ her. That is supported, albeit in general terms, by the letter from Rethink in the bundle. We have no difficulty in accepting the sincerity of the Appellant and that the employment that she wishes would be forthcoming.

59. As regards the circumstances in Zimbabwe, the Appellant's mother and four sisters live there. She lived close to them before coming to the UK and maintains contact with them. The Appellant owns a property in Zimbabwe. That is the property which is rented out and the income from which is collected and managed by Great Zimbabwe Realtors to which we have already referred earlier in this determination.

60. We have already referred to the Appellant's financial situation and it has never been suggested that she has at any time sought to rely on public funds in the UK. She told us that she supports herself from her work in the UK, rental income from Zimbabwe and some additional support from a cousin in the UK.

61. The correct approach to proportionality is set out by Lord Bingham in Razgar (at [20]):

> "[it] involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention."

62. The "individual" of course includes both the Appellant and her daughter (Beoku-Betts v SSHD). The assessment is necessarily a fact-rich and fact-specific exercise.

63. In NA (at [105]) the Tribunal identified the position of students seeking to become Tier 1 post-study workers:

> "…[students] are persons who have come to the UK for a limited purpose and with no expectation of being able to stay except by meeting the requirements of the Immigration Rules. They do not thereby acquire a right to remain in the UK despite the Immigration Rules. A refusal under the Tier 1 (Post-Study) scheme may mean they fail to make their immigration prospects better; it does not mean they have been made worse."

64. We agree with that pertinent observation. The Tribunal's observation in NA highlights the real difficulty faced by an unsuccessful applicant under the Tier 1 Scheme who seeks to establish that the decision to refuse further leave under that Scheme which, in depriving him of his existing ties and perhaps also the opportunity to continue or obtain future work in the UK, amounts to a disproportionate interference with his right to private life under Art 8.

65. The ECtHR has on numerous occasions emphasised the right of a signatory country to regulate and control the entry to and residence of non-nationals in its territory (e.g. Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 471 at [42]; Üner v The Netherlands [2007] INLR 273 (GC) at [54]). A Tier 1 post-study applicant's presence in the UK remains "contingent" on complying with the Immigration Rules and Guidance under the points based scheme and there can be no expectation of a right to remain if these are not met. They lay down rigorous criteria and there will always be, as the Tribunal noted in NA, "hard cases or 'near-misses' that fall through the net" (at [103]). Also, the character of an individual's 'private life' relied upon in cases of this sort is ordinarily by its very nature of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK. In that respect, 'private life' claims are likely to advance a less cogent basis for outweighing the public interest in proper and effective immigration control than are claims based upon 'family life' (or quasi-family life such as same-sex relationships) where the relationships are more likely to be unique and cannot be replicated once the individual leaves the UK.

66. That said, each case must necessarily depend upon its specific facts and it is essential that a judicial decision is reached applying an "even-handed application of the proportionality tests" (WB (Pakistan) v SSHD [2009] EWCA Civ 215 at [16] *per* Sedley LJ). There can be no *a priori* conclusion or presumption about the outcome based, for example, upon the premise that successful cases will be rare or exceptional (WB (Pakistan) at [16] *per* Sedley LJ). What has been described as the "difficult evaluative exercise" entailed in the proportionality test must always be undertaken (EB (Kosovo) v SSHD [2008] UKHL 41 at [12] *per* Lord Bingham of Cornhill).

67. We repeat that the Appellant and her daughter's private life in this country (as relied upon before us) will cease if removed. Their family life will of course continue in Zimbabwe and the Appellant's immediate family is there. So, it is fair to assume, will an alternative private life including school for the Appellant's daughter. Ms Aslam did not rely upon any adverse conditions or absence of schooling for the Appellant's daughter in Zimbabwe and did not put before us any material relating to the situation in Zimbabwe. We do not understand that the Panel was in any different position. As we have said, the Appellant's case was put on the sole basis of what she (and her daughter) would lose, or more perhaps accurately, not gain in the UK if removed. It is the Appellant's position that she will return to Zimbabwe but she wishes to postpone that until she has worked under the Tier 1 scheme, presumably for the 2 years allowed. Rather, the loss of the future enjoyment of their private life in the UK was the basis for Ms Aslam submitting that the Tribunal should find a breach of Article 8.

68. The Appellant has always been in the UK on a temporary basis as a student. During that time she, and since her arrival, her daughter, have developed a private life through their work, social ties and school. At no point has the Appellant (or her daughter) had any expectation of remaining in the UK unless she was able to comply with the Immigration Rules. For the reasons we have already seen she does not. She fails to meet the maintenance element of the Tier 1 scheme by some margin (as it now appears) when her dependent child is factored in. In truth, both can reasonably be expected to return to Zimbabwe and continue the lives that they led prior to coming to the UK on a temporary basis as a student (in the case of the Appellant) or as a dependent of a student (in the case of the Appellant's daughter).

69. Taking all these circumstances into account, and adopting an "even-handed application" of the proportionality test, in our judgment the legitimate aim of proper immigration control outweighs the rights of the Appellant and her daughter to respect for their private life in the UK on the basis claimed.

Conclusion

70. The Panel erred in law by failing to consider both the family and private life aspects of the Appellant's (and her daughter's) case. That error was, in our judgment, material to their decision. Their decision in respect of Art 8 cannot stand.

71. However, for the reasons we have given, we substitute a decision dismissing the appeal under Art 8 as the Appellant has failed to prove on a balance of probabilities that the Respondent's decision breaches Art 8.

Decision

72. Thus, for the reasons we have given, the appeal is dismissed in respect of the Immigration Rules (namely para 245Z) and Article 8.

DATE: