IAC-BFD- MD

Upper Tribunal (Immigration and Asylum Chamber)
IA/21282/2014

Appeal Number:

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 7th November 2014	**On 14th November 2014**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

MISS MAUREEN CHIANU ANOJE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss G Patel, of Counsel
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant Maureen Chianu Anoje was born on 22nd May 1985 and is a citizen of Nigeria. The Appellant had appealed to the First-tier Tribunal (Judge Caswell) against the decision of the Respondent dated 9th May 2014 refusing to vary her leave to remain in the UK and issuing removal directions under Section 47 of the Immigration Asylum and Nationality Act 2006.

2. The Appellant entered the United Kingdom is September 2010 with leave to remain until 2012 as a student. She was then granted leave to remain under Tier 1 as a Post-Study Worker until 2nd March 2014.

3. The Appellant's case can be summarised as follows. While she was still living in Nigeria, she had symptoms of headache and vomiting and had a CT scan which showed a significant mass in her brain, although possibly there was not a precise diagnosis. She received treatment in Nigeria. Within a month of her arrival in the UK, the Appellant had similar symptoms and sought medical treatment here. There was hydrocephalus diagnosed. The Appellant had further investigation and treatment, and a diagnosis of Ependymoma (a type of brain tumour) was made. She had major surgery at Sheffield Teaching Hospital, including removal of part of the tumour. She then had radiotherapy. All treatment for the cancer ceased in February 2012. There has been no recurrence of cancer.

4. Because the surgery to remove the tumour had damaged her eye muscles, she was left with constant double vision. She has had two operations to her eyes which have partially corrected this. She is now being monitored with three monthly MRI scans. The aim of these is to see if there is any growth of or change to the residue of tumour left in her brain. If she manages a year without further incident, she can consider a further eye operation to try and improve her vision. Her vision is better than it originally was after the brain tumour operation, but she still has an area of double vision.

5. After considering the Appellant's case under Article 3 and Article 8 ECHR the FtT dismissed the Appellant's appeal. The Appellant sought and was granted permission to appeal. The grant of permission sets out comprehensively the arguable error on the part of the FtT and the relevant parts of the grant are set out here.

> "I note that the Article 3 conclusion is not challenged, and in view of the N threshold this is unsurprising.
>
> In relations to Article 8 arguably legal points do arise. It is arguable that the proportionality assessment at [23] of the determination lacked reasoning in that it did not set out any of the factors on either side of the balance. As is clear from **MM (Zimbabwe) v Secretary of State [2012] EWCA Civ 279** there can be cases where health matters, combined with private or family life, could produce an outcome in an appellant's favour, and what is also clear is that a detailed fact specific proportionality assessment is needed. There are differing opinions as to the **Gulshan** approach, but in any event the arguability decision at [22] is arguably hard to reconcile with the **MM (Zimbabwe)** approach (see also **Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400)**. Another arguable point is that the public interest factors inserted into the 2002 Act by s19 of the 2014 Act should have been considered in the proportionality assessment."

6. Thus the matter comes before me to decide in the first instance whether the determination of the FtT discloses an arguable error of law.

The UT Hearing

7. Miss Patel for the Appellant relied in the main on the grounds seeking permission. She submitted that the FtT had erred in its lack of reasoning for its Article 8 conclusion, in particular a lack of consideration of the principles in **MM (Zimbabwe) v Secretary of State [2012] EWCA Civ 279**. She submitted that had the FtT recognised the principles both in **MM (Zimbabwe)** and **Akhalu** then a different outcome would have been reached.

8. Miss Patel also picked up on ground 4 of the grant of permission. She said the Judge had fallen into error in not recognising that her decision and subsequent promulgation of this appeal occurred on 13th August 2014. Therefore the public interest factors inserted into the Nationality Immigration and Asylum Act 2002 by s19 of the 2014 Act should have also been considered in the Article 8 proportionality assessment.

9. Mr Diwnycz defended the determination to the extent of saying that the Appellant could not meet the threshold of **D v United Kingdom [1997] ECHR 25** in respect of any Article 3 breach. However so far as the Appellant's Article 8 rights are concerned he said with customary fairness that he accepted that **MM (Zimbabwe)** did illustrate that there could be a case where health matters combined with private or family life could produce an outcome in an Appellant's favour. He accepted that this required a detailed fact specific proportionality assessment to be made. He agreed that in the present case it did not appear that this assessment had been carried out.

10. I am satisfied having heard from both representatives that for the reasons shown in the grant of permission and set out by Miss Patel, the FtT determinations is legally unsustainable. It lacks a detailed analysis of the Article 8 proportionality test such as that set in **MM (Zimbabwe)**.

11. At the end of submissions I announced I was satisfied that the decision of the FtT should be set aside for legal error and the decision remade. So far as disposal is concerned both representatives were of the view that fresh findings of fact would need to be made and that the appropriate course is to remit this matter to the First-tier Tribunal (not Judge Caswell) for that Tribunal to remake the decision.

Decision

12. The decision of the First-tier Tribunal is set aside. The matter is remitted to the First-tier Tribunal (not Judge Caswell) to remake the decision.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal **13th November 2014**