IAC-FH-AR-V5

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01209/2013

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 30 March 2015	**On 19 May 2015**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE ESHUN

Between

AM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Balroop, instructed by Shan & Co
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Zimbabwe. He appealed to a First-tier Tribunal Judge against the respondent's decision of 6 June 2013 to refuse to revoke a deportation order.

2. We will not go into great detail as to the contents of the judge's determination save as regards the particularly relevant issues. He noted the appellant's immigration history including the fact that he had eight convictions for nineteen offences and the fact that as a consequence of his

convictions totalling an aggregate of twelve months or more he was notified on 9 November 2006 by a decision to make a deportation order against him. He appealed against that decision but his appeal was dismissed as was a subsequent High Court review. On 6 March 2007 a deportation order was signed and was served on the following day. On 18 May 2009 the appellant was convicted of possession of fire arms and three counts of supplying Class A controlled drugs, heroin, for which he received a sentence of seven years and two years respectively, amounting therefore to a total of nine years' imprisonment.

2. The judge noted that the appellant has a British wife to whom he has been married for a number of years, and a British child. The appellant and his wife are both HIV positive. His wife also suffers from depression.

3. Most recently the appellant was sentenced to six months' imprisonment on 14 February 2014 for possession of cannabis which he had taken into prison. His evidence was that he did not realise it was in his pocket and when he realised it he panicked and gave it to the person he was visiting to get rid of it, but his wife's evidence was that he had been forced by the cousin he was visiting to take the drugs and was under pressure.

4. The judge in a very detailed and careful consideration noted the relevant tests, taking into account decisions such as Maslov, Grant, MF (Nigeria), MM (Lebanon) in setting out the legal background. He paid careful attention to the judge's sentencing remarks at the time of the appellant was sentenced to nine years' imprisonment and noted the two NOMS reports, and as a consequence of his assessment of the evidence as a whole he concluded that the appellant was at high risk to the public given his previous offending and the escalation in it, and that he was at least medium risk of reoffending. There is no challenge to those findings.

5. The judge noted the evidence concerning the appellant's health. He had been diagnosed as HIV positive in 2003, although in November 2010 his CD4 count indicated that he did not require treatment, over the following twelve months it dropped considerably which indicated that he was having difficulty accepting treatment and that the initial drug given to him had had significant side effects and that was discontinued after one week. He commenced on Eviplera in June 2012 and that had no side effects and his CD4 count had risen again.

6. The evidence in a medical report of 10 May 2013 was that if the appellant were returned to Zimbabwe it was doubtful as to whether he would be able to obtain antiretroviral medication or blood tests required to ensure the treatment was successful and would not be able to obtain his current regime as it was a relatively new drug and not available in many countries. The report went on to say that if he were unable to obtain treatment his HIV would progress with a fall on the CD4 count which would lead him to be susceptible to opportunistic infections which if not treated would lead eventually to death.

7. A subsequent report of 14 August 2014 stated that it was vital that antiretroviral therapy be maintained lifelong and that if he did not receive treatment his viral load would rise and his CD4 count would decrease and

he would be at risk of developing opportunistic infections, opportunistic cancers and premature death.

8. In addition the appellant had suffered from depression since the death of his mother in 2004. The judge accepted that Eviplera was not referred to on the list of drugs currently available in Zimbabwe.

9. In addition the appellant's wife had health problems. She was diagnosed as HIV positive on 14 February 2006. The report on her said that although she was physically well from the HIV point of view she had often struggled psychologically with the diagnosis and indeed had problems in bringing up her son on her own and missed the support of her husband who had been in prison for a large part of their relationship. He had a history of anxiety, low mood and stress and had suffered from depression, taking an overdose of paracetamol in November 2007. The more recent report on her of 6 August 2013 said that she continued to appear anxious and was tearful and reported being forgetful and having difficulty coping with daily living and caring for her son, and that she was fearful about her husband being deported. She was not under any form of psychiatric care at present but was awaiting counselling from local services. She had had further thoughts of self-harm and the doctors were concerned about her welfare.

10. As regards the couple’s son, who was born in 2006, there was evidence that he had struggled without the support of a father and saw a counsellor at school. He had a history of eczema for which he required regular emollient creams. Evidence from his primary school teacher noted that he was very quiet and withdrawn and said he was missing his father and was upset, and this was confirmed by his mother. As a consequence, at the beginning of the following school term began one-to-one session of counselling from the Young Concern Trust and it seemed that such levels of support would be expected to last up to six months. A further letter from his primary school dated 3 June 2014 which the judge noted indicated that he was showing signs of emotional distress which they believed were linked to the potential deportation of his father and the counselling sessions begun and they recognised the need to continue to assist him in working through his emotional issues. No additional counselling was being provided by CAMHS as he was currently receiving counselling from school but his mother believed that if the school counselling stopped he would be eligible for additional counselling through them.

11. As regards the issue of the appellant's health and its treatment, the judge noted the evidence as set out above but commented that the appellant had only had one previous alternative treatment and the reports provided by him did not indicate that he could not tolerate any other type of treatment which might be available in Zimbabwe.

12. As regards the issue of the appellant's son, the judge accepted that it would be unduly harsh to expect him and his mother to return to Zimbabwe to maintain their relationship with the appellant there. He took into account the fact that the best interests of the appellant's child were a

primary consideration and clearly his best interests were to live in a family unit with both his mother and father in a loving relationship. He noted that the son was established in the school and receiving assistance from the school as a result of his father's detention in prison and the possible effects of his removal, and he also took into account the fact that all of his son's other relatives were in the United Kingdom and he clearly had a close bond with his maternal grandmother and did see both the appellant's father and the appellant's aunt albeit on an ad hoc basis. He noted that although the appellant's wife clearly had difficulties herself due to her depression and her HIV status, she did have support from her family in relation to looking after her son and had indicated that she was looking to increase her part-time work so that she could come off benefits. Her son had been cared for on occasions by her sister who herself had three children and clearly he would have established a relationship with them, although he noted the illness of the appellant's sister (she has a crumbling spine and will be in a wheelchair in the next five years and currently has metal rods in her spine) but his mother's evidence was that her sister looks after her son when she is at work. The judge accepted that there would be difficulties for both the appellant's wife and his son by his removal and that the best interests of the son were not a trump card and the son would be cared for by his mother as he had been for his whole life and would continue to receive support both from his family and also through counselling which would assist him in coping with the appellant's removal.

13. At paragraph 200 the judge said, taking into account all of the factors in favour of the appellant including the effect on his son and his wife by his removal and taking into account his HIV status and the problems he might face on return to Zimbabwe as a result, balancing these against the respondent's legitimate aim he was not satisfied that the appellant had shown that these factors, even when cumulatively taken together, were sufficient to constitute exceptional or very compelling circumstances of the kind which outweighed the public interest in his deportation, clearly bearing in mind the provisions of section 117B and C of the 2002 Act.

14. The appeal having been dismissed, the appellant sought and was granted permission to appeal on essentially two grounds which were developed by Mr Balroop before us. The first is that the judge failed to take into account material factors in assessing compelling circumstances and failing to place any or any due weight on the appellant's medical condition and the fact that the medication he requires is not available in Zimbabwe. The second ground concerns the alleged failure to make any or any proper assessment of the best interests of the child.

15. Mr Balroop developed these points before us as follows.

16. On the first point the judge had said there were other medications available and there was no evidence he could not use them. This was an unlawful finding. The Tribunal was referred to the doctor's letter at pages 100 and 111 of the bundle.

17. It was clear that Article 3 was not relied on and only Article 8, and in that regard the decision of the Court of Appeal in JA (Ivory Coast) [2009] EWCA Civ 1353 was put in on the point that, as set out at paragraphs 25 and 26 in the judgment there, Article 8 issues would fall to be considered in an HIV case.

18. On the second point, the judge accepted the relationship with the child and the impact on the child of the deportation proceedings. He erred at paragraphs 188 and 189 concerning the proposed support for the child, since it was clear from paragraph 55 and the appellant's wife's evidence that her sister was unable to help. She said she could not take the child on her own without the appellant, given her health problems. There was a lack of support for her without the appellant. The judge seemed to think that the sister's help could make a difference but was not right on the evidence. The errors in this regard related to matters which showed very compelling exceptional circumstances which had not properly been considered by the judge and there was a clear error of law.

19. In his submissions Mr Bramble argued that one had to bear in mind the appellant's criminal history as the context to the particular matters in respect of which challenges were made. The grounds were a disagreement only. The judge had gone through the medical evidence and the objective evidence concerning Zimbabwe. He was clearly aware that it was a matter of Article 8 rather than Article 3 as set out at paragraph 84. JA was irrelevant as it was not a deportation case. There was therefore a lack of such a strong public interest as in this case which is affected by the appellant's criminality. It was a question of whether, when all the evidence was taken into account, the findings were sufficient or incorrect so as to amount to a material error of law. The judge's findings were open to him.

20. As regards the child, the judge was clearly aware of the child's problems and could only take the evidence so far, as for example could be noted from paragraph 73 in the Presenting Officer's submissions where it was clear there was no psychological report on the child. The weight of the public interest had to be taken into account and what had been said in LC (China) was of importance. The public interest in this case was very strong. The determination was sound.

21. By way of reply, Mr Balroop agued that the judge had spoken in terms of the Article 3 test in particular at paragraph 102 of the determination and also the relevant criteria in that regard at paragraph 111. With regard to the conclusions at paragraph 198, the judge was obliged to provide further reasons in order to make a finding. that was a material error of law. Although the judge had set out what was said by the doctors at paragraphs 176 and 177, he had not taken it into account in his conclusions at paragraph 198 but speculated about the possibility of another drug that could help. It was unclear how he had concluded as he did. It was necessary for him to say what the other available drug was.

22. As regards ground 2, the issue was not with the child per se but the situation with regard to the mother had not been properly considered as

she had her own problems and needed the appellant's help. The judge had ignored the problems. There was no support from the family and material factors had not been considered or not considered properly. With regards what was said at paragraph 194 about support from the family it should be asked what family was being referred to and what support and the appellant's wife herself needed support. These were the compelling circumstances. Both the child and the mother were in receipt of counselling. These had to be material matters.

23. We reserved our determination.

24. We consider first ground 1, but at the same time reminding ourselves of the context of the decision which is the serious criminal record of the appellant and the unchallenged findings that he is at high risk to the public given his previous offending and is at least at medium risk of reoffending. That being said, it is of course right, and Mr Balroop reminded us, that if there are errors of a material nature they are to be treated as such despite the significant public interest that clearly exists in this case.

25. The particular evidence to which Mr Balroop took us is the letter from Dr Mun-Yee Tung, dated 14 August 2014, to which we have referred above and which the judge summarised at paragraph 177 of the determination. It is clear from that evidence that the antiretroviral therapy initially employed proved to be ineffective, in that the appellant could not tolerate it because of bad side effects. In light of the fall in his CD4 count Eviplera was tried and he tolerated this and the CD4 count rose to an acceptable level. It was accepted by the judge that Eviplera is not available in Zimbabwe. He also noted the doctor’s prognosis that if the appellant did not receive treatment his viral load would rise and his CD4 count would decrease the ensuing risks as a consequence, which we have set out above.

26. In this regard the judge commented at paragraph 183 that the appellant had only had one previous alternative treatment and the reports provided by him did not indicate that he could tolerate any other type of treatment which might be available in Zimbabwe. At paragraph 198 he reminded himself that the current medication was not available in Zimbabwe but said that there were a number of other medications available and he did not have medical reports indicating that the appellant could not be placed on any of them.

27. We do not read this as the judge having in effect speculated as to the possibility of another drug that could help. The judge properly considered the medical evidence, noting that one type of antiretroviral treatment had not succeeded but that another kind had. There is nothing in the doctor’s letter to say that the only possible antiretroviral therapy is Eviplera, but we consider, bearing in mind that the burden of proof is on the appellant that it was for him to show that that was the case if he wished to show that he would be at risk of a significant determination in his health and possible death on return to Zimbabwe if the particular medication which he is on is not, as is accepted, available to him and more significantly, for these purposes, that there is no alternative medication available to him.

We do not consider that the judge improperly speculated in this regard, but simply in the context of the proper burden of proof and the evidence before him came to a conclusion that was clearly open to him.

28. As regards the situation of the appellant's son, it is relevant to bear in mind from the appellant's wife's evidence that she said that her sister looked after their son when she is at work and would not be able to become more involved as she has her own three children and has medical problems. Her evidence was also that her son did see his aunt and that she sees her father-in-law but not regularly although he does buy birthday presents and has been over to the house. We consider that, bearing in mind this evidence, it was clearly open to the judge to say at paragraph 188 that the appellant's wife does have support from her family in relation to looking after her son and also at paragraph 189 that the son is cared for on occasions by her sister and that her sister's support is still available to her. It was also open to him to note at paragraph 187 that all of the son's other relatives are in the United Kingdom and he clearly has a close bond with his maternal grandmother, who gave evidence before the judge and she said that she did her best to provide him with emotional support to her daughter and her grandson and that she saw her grandson nearly every day. The references to Article 8 are by the way. At paragraphs 101 and 102 the judge briefly addressed the issue, in effect solely to satisfy himself that the lack of reliance on Article 8 was appropriate, which was clearly right.

29. The judge took into account the psychological evidence and other medical evidence concerning the appellant's wife and her medical history and also the problems of her son including the ongoing counselling that it seems he may still be receiving as well as the eczema for which he has a history. The judge was clearly aware of the difficulties they would both face as a consequence of the appellant's removal and made it clear that it would be in the best interests of the son to live in a family unit with both his mother and father in a loving relationship, but that the son's best interests are not a trump card and that he will be cared for by his mother as he has been for the whole of his life and will continue to receive support from his family and from the counselling. He balanced these factors against the respondent's legitimate aim and came to a conclusion that was properly open to him. We consider that this is not only a very detailed determination but also a careful one where the judge has not lost sight of the need to place the evidence in the context of the relevant legal tests and came to conclusions that were properly open to him. As a consequence we find there is no error of law in this decision and the judge's decision dismissing the appeal is maintained. The direction regarding anonymity is maintained.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Upper Tribunal Judge Allen