Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52527/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 15th May 2015	**On 27th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ARLETE FRANCISCO MAVILA DEACON
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Mohzam (Solicitor)
For the Respondent: Mr N Smart (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Nixon, promulgated on 30th July 2014, following a hearing at Birmingham on 18th July 2014. In the determination, the judge allowed the appeal of Arlete Francisco Mavila Deacon. The Respondent Secretary of State,

subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of Mozambique who was born on 1st June 1980. She appealed against the decision of the Respondent Secretary of State dated 28th November 2013, refusing her application to remain in the UK on Article 8 grounds as the wife of her husband, Mr Herbert Deacon, who is a British citizen present and settled in the UK, for whom she cares because he had a brain tumour removed in the UK in August 2012, having initially fallen ill in Mozambique, where the two of them lived together, such that he now needs constant care by his wife.

The Judge's Findings

3. The judge considered the Appellant's case that, although her husband has four children in the UK, he has contact with only two, who live close by, but that "they were unable to provide full-time care" and that:

> "The Appellant helped him with day-to-day living, as he struggled with his mobility, hearing loss and imbalance and memory problems. He had been recently diagnosed with diabetes ..... he continued to attend regular medical appointments ...." (paragraph 5).

4. The judge's findings were that,

> "I accept, as did Judge Malloy, that when the Appellant came to the UK, her intention was to care for him after his operation and to return to Mozambique at the end of her stay. It was clearly the hope of the couple that Mr Deacon's health would improve after his brain tumour was removed and they could return to their life in Mozambique where they have lived as a married couple throughout their relationship ..." (paragraph 10(4)).

5. The judge considered then the evidence of the parties before her. She found Mr Deacon himself "to be a credible witness and I am content to accept his evidence as to his current medical situation and his needs". She also referred to the letter of his GP of 11th November 2013, "which confirms what I have been told, namely, that the Appellant is caring for her husband on a daily basis ..." (paragraph 10(5)). The judge was satisfied that the Appellant's husband "was not overplaying his symptoms, but that he was perhaps not emphasising as much as he could his need for assistance. He did make it very clear that he was not coping well without his wife. I accepted as credible the evidence of both ...." (paragraph 10(5)).

6. The judge's conclusions were that although Mr Deacon would be entitled to some support from Social Services, it is unlikely that this would be 24 hour care and naturally such support would not be with the necessary emotional support.

> "I find it perfectly understandable that Mr and Mrs Deacon want to deal with his problems themselves, as any other married couple would so wish and it would be a cruel option to keep the couple apart any longer ... I do not see the option of his young sons caring for him to be a realistic option, as they have their own lives ..." (paragraph 10(6)).

Thereafter, the judge had regard to the established legal principles in **Chikwamba [2008] UKHL 40** and **Hyatt [2011] UKUT 00444**, and observed that although there were no obstacles to an application being made from abroad, in this case, the only public interest factor weighing in favour of the Secretary of State was the necessity for proper immigration control (see paragraph 10(7)). The judge was not satisfied that this was a sufficiently weighty factor given the other interests on behalf of the Appellant herself.

7. The appeal was allowed.

Grounds of Application

8. The grounds of application state that the judge overlooked the fact that the starting point for Article 8 cases is that the Immigration Rules are a complete code (see **MF (Nigeria) [2013] EWCA Civ 1192**) and it was made clear in **Gulshan [2013] UKUT 00640**, that the Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by the Rules. The judge had failed to draw attention to the compelling and exceptional circumstances in this case.

9. On 17th September 2014, the application for permission to appeal was rejected by Judge PJG White , on grounds that the judge had identified compelling grounds as to why the Appellant should not be removed (see paragraph 10(2)). Moreover, the judge set out the nature and consequences of the Appellant's serious illness and the physical and emotional care required from the Appellant (see paragraphs 5, 10(5), and 10(6)). Furthermore, the judge's conclusions were that compelling circumstances did exist.

10. Upon renewal, permission to appeal was granted by Upper Tribunal Kekic on 6th January 2015 on grounds that the judge had not provided adequate reasons for why the Appellant's circumstances were exceptional.

Submissions

11. At the hearing before me on 15th May 2015, Mr Smart, appearing on behalf of the Respondent Secretary of State began by submitting that the judge had taken the wrong decision in **Hyatt** into account because she had referred to the Tribunal decision in **Hyatt**, which had been successfully appealed in the Court of Appeal in **Hyatt [2012] EWCA Civ 1054**. This decision was important because it emphasised in paragraph 30(d) that in considering Article 8 all the material factors must be taken into account.

12. One essential material factor not taken into account by Judge Nixon was the fact that the visa processing times in Pretoria, South Africa, showed that most applications are processed within 30 days. If this is all the length of time that the Appellant would have to wait in Pretoria before she could make an application to re-enter in order to join her husband, it could not be said to be a disproportionate infringement of her Article 8 rights. The failure by the judge to take this into account was a clear error of law.

13. These considerations were important because at paragraph 50 of the Court of Appeal decision in **Hyatt**, it is made clear that a person who had entered on a temporary basis did not have a legitimate expectation of a right to remain, that family life could continue in the country overseas, and any period of separation would be short. These factors were clearly germane to the instant appeal. The failure of the judge to consider them was an error of law.

14. For his part, Mr Mohzam referred to his skeleton argument and submitted that the point in relation to the visa processing times in Pretoria was a new point, not previously raised in the Grounds of Appeal, and certainly raised before the judge below. It was not suggested to the judge in the Tribunal below that the processing times in Pretoria were under a month. It was wrong to raise it now. Furthermore, the judge's findings were clear and comprehensive, and she pointed to the fact that the Appellant's husband's "emotional support" was also being provided by the Appellant's presence and care for her husband in the UK (see paragraph 10(6)). The judge had given proper reasons and this was tantamount to simply a disagreement with the findings of the judge.

No Error of Law

15. I am satisfied that the making of the decision by the judge did not involve the making of an error of law under Section 12(1) of TCEA 2007 such that I should set aside the decision. The decision of the judge below is clear and comprehensive and deals adequately with both the facts and the case law, which is fully explicated in the body of the determination.

16. First, the judge finds both the Appellant and her husband to be credible witnesses in respect of the relationship and the care that the Appellant provides for her husband.

17. Second, the judge finds that the provision of care is genuine and necessary and that, if anything, the Appellant's husband was underplaying the extent of his need for the care of his wife.

18. Third, the judge does consider the possibility of Social Services support for the Appellant's husband, but it is clear that, "it is unlikely that there should be 24 hour care and naturally such support would not deal with the necessary emotional support". Nothing before me suggests that this conclusion was not one that could properly be drawn from the facts before the judge.

19. Finally, the suggestion in the Grounds of Appeal, that the Appellant's husband's young sons had at one point looked after the Appellant's husband is completely without foundation and accordingly, the judge is correct to say that the option of his young sons caring for him is not a realistic option.

20. In short, I conclude that this is not a proper case for the finding of an error of law by the judge. The judge did not misdirect herself. Her conclusions are not irrational. They are properly reasoned. Any suggestion with respect to the "visa processing times" is ill-placed given that it was not raised before the judge and has not been raised in the Grounds of Appeal, and does not in any event, disturb the proper findings of the judge below.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 20th May 2015