Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10725/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 February 2018	**On 23 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

JOSEPHINE [T]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Asanovic, of Counsel instructed by Messrs D J Webb & Company Solicitors
For the Respondent: Ms K Pal, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of Judge of the First-tier Tribunal N J Bennett who, in a determination promulgated on 25 April 2017, dismissed the appellant's appeal against a decision by the Secretary of State to refuse her leave to remain on human rights grounds.

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2. The appellant is a citizen of Zambia who was born on [ ] 1984. Between 1996 and 2001 she lived in India where her brother-in-law worked as a diplomat. She then returned to Zambia to sit her A levels. In 2003 she came to Britain as a visitor and remained without authority. In July 2012 she made an application for leave to remain as the spouse of a settled person which was refused in March 2013. A further application on the basis of her private life was made in March 2014 which was refused in June 2014. On 26 July 2015 she applied for leave to remain on human rights grounds based on her relationship with a British partner. The refusal of that application is the subject of this appeal.

3. The appellant no longer appeals on the basis that she has a partner here as that relationship has broken down. Her appeal was based on the interference with her private life here. The judge heard evidence from the appellant which indicated that she had lived with relatives here from time to time but after a period of study at the Open University she had stopped studying. Her mother had died in 2012 and she was not in contact with other family members in Zambia and she did not know whether her mother had owned property in Zambia. She stated that her mother had been a broadcaster and a journalist. She asserted in her statement that she had HIV and that the stigma of that would mean that she would be unable to make relationships in Zambia.

4. The judge stated in paragraph 27 that there was no challenge to the appellant’s evidence that she had lived here since she was an 18 years old and that she spent five years in India before coming here and she did not know any relatives in Zambia. He accepted that she suffered from HIV.

5. The judge had been provided with a report by Avert about HIV and AIDS in Zambia. He had clearly considered that report in detail. He stated that it was a British charity which did work in Sub-Saharan Africa in the fields of HIV and AIDS and that the report indicated that in 2015 out of a population of 16.2 million 1.2 million people lived with HIV in Zambia and that over 63% of the people in need of antiretroviral treatment there received it. Zambia has adopted World Health Organisation treatment guidelines and anyone testing positive for HIV should be given treatment regardless of their CD4 count. 63% of adults age 25 and over taking antiretroviral treatment were reported to have achieved viral suppression. The report said that in 2014 85% of Zambians were reportedly taking treatment after a year. He stated that it was simply therefore not the case that the appellant would be unable to obtain treatment in Zambia. With regard to social attitudes to HIV he noted that about 15% of the population tested for HIV in 2014 and that there were a combination of reasons why people were not testing for HIV which included the fear of stigma, rejection by a sexual partner, fear of antiretroviral treatment and a belief that traditional medicine would keep them health if they became ill. He noted that the appellant had emphasised in her statement her concerns about the stigma of having HIV and he said that it was not unreasonable to conclude that attitudes to HIV had probably changed in Zambia over the years just as

they had changed in the West. It was of note that the appellant's statement details what she believed was the situation when she had last lived in Zambia. The judge noted that in 2016 42% of all young people between the ages of 15 and 24 were aware of their HIV status and a government survey conducted in 2013/2014 said that 46% of female respondents and 37% of male respondents in the 15 to 49 age group reported having had an HIV test in the last twelve months and knowing their results. The report had suggested that 39% of the population had a comprehensive knowledge of HIV and 42% of young women and 47% of young men having comprehensive knowledge of it. He stated that "While I do not doubt that ignorance and prejudice continue to exist about HIV, I am not satisfied that this is as extreme as the appellant fears".

6. He then went on in paragraphs 31 and 32 to state as follows:-

> "31. As the Appellant has no experience of living in Zambia as an adult and as she has nobody to turn to for support and advice, I accept that she would face difficulties in establishing herself there. I accept that she will probably be depressed at being separated from her friends and relations and the life which she has built here. I also accept that her illness will add to her problems in integrating into Zambia and that overall she will be face significant obstacles when integrating there.
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> 32. However, to succeed under paragraph 276ADE(1)(vi), she must show that these obstacles are 'very significant'. This is a high threshold because the word 'very' is not otiose. She will not be destitute because she realistically accepted in her statement that friends and relatives here and abroad would rally round while she established herself. These friends and relatives may well be only willing and able to do this for a limited period but she has shown herself to be resourceful here. I do not therefore accept that she will probably become destitute or that it is reasonably likely that she will do so. She has a diagnosis and knows what she must do to keep her illness under control. In the light of Avert's report, there is no reason to believe that she will probably be unable to obtain medication and treatment which she needs or that it is reasonably likely that she will be unable to obtain it. I am not satisfied that the obstacles which she will face amount to very significant obstacles".

7. The judge, in paragraphs 33 onwards, considered the issue of proportionality outside the confines of the Immigration Rules. He pointed out that Article 8 did not give the appellant the right to decide where she would live. He referred to the public interest in maintaining effective immigration control. He noted that the appellant did not qualify for leave to remain under the Immigration Rules and said that she has not shown that there were very significant obstacles to integrating into Zambia. He said "I am not satisfied that the obstacles she will face in integrating there coupled with the strength of her private life make it disproportionate to remove her". He referred to Sections 117B(4) and (5) which provided that little weight should be given to private life which is established when a person's presence here is unlawful or precarious. He noted the appellant

had established her private life here while her status was precarious or unlawful. He said that she could maintain contact with her friends and relatives by modern means of communication just as she does with her sisters in Australia and America. He therefore dismissed the appeal.

8. The grounds of appeal, having noted the basis of the appellant's claim referred to a decision of Sales J in **S** referring to the phrase of "very significant obstacles" which stated that "integration" as set out in Section 117C(4)(c) and paragraph 339A was a broad one and was not confined to mere ability to find a job or sustain life by living in the other country. He had said that it was not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or Tribunal simply to direct itself in the terms that Parliament had chosen to use. The idea of "integration" called for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there and to be able to operate on a day-to-day basis. It was therefore argued that the judge had erred in his decision that there would not be very significant difficulties in the appellant returning to Zimbabwe.

9. The grounds went on to argue that in the case of **Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813** in relation to the concept of very significant obstacles to integration was not confined to the mere ability to find a job or to sustain life by living in the other country but called for a broad evaluative judgment as the person will be enough of an insider to operate on a day-to-day basis and to form relationships in that society. It was argued that very insignificant obstacles might well be greater obstacles than significant ones, but expecting a person to be destitute is in no way a part of the test. The grounds emphasise that the appellant had lived outside Zambia for the majority of her life since aged 12, that a holistic judgment was required, moreover the grounds also argued that following the judgment in **R (Agyarko) v SSHD [2017] UKSC 11** with respect to the assessment of weight to be given to the public interest in the context of tolerated presence in the United Kingdom, the delay in enforcing immigration control would weaken the public interest in maintaining such immigration control. It was pointed out that the Secretary of State had not acted on four refused applications over four recent years. It was stated that that was against the background of the fact that unlawful presence came to be while she was in a genuine relationship with a British partner for the vast majority of her time in Britain which would have continued but for domestic violence.

10. Ms Asanovic referred to the grounds of appeal emphasising the question of the issue of destitution. She noted that the judge accepted that there would be significant obstacles but stated that he had by placing emphasis on the term "destitute" applied the wrong test. He had applied in effect too high a threshold regarding the obstacles to the appellant exercising

her private life in Zambia and similarly too high a threshold when considering the access to medication and the stigma against someone with HIV. She accepted that the appellant had overstayed but emphasised the judgment in **Kamara** to which reference was made in the grounds that a holistic approach should apply. She stated that the appellant had not experienced life in Zambia and would have no support there. She added that the appellant had had a tolerated presence here. She referred to paragraphs 51 and 52 of the judgment in **Agyarko**.

11. In the reply Ms Pal stated that the judge had made clear and appropriate findings of fact and had clearly applied the correct test. He was correct to emphasise the high threshold of very significant obstacles. She emphasised that the judge was correct to find that the appellant had shown herself to be resourceful here and that he had properly considered the Avert report. It was not the case that the judge was suggesting that the test was one of destitution. She stated that he was correct to find that there were no very significant obstacles to the appellant returning to Zambia. Moreover there was no evidence of undue delay in the respondent considering her various applications.

Discussion

12. I consider that there is no material error in law in the decision of the judge in the First-tier. The reality is that he did consider the appellant's circumstances holistically, indeed he considered at very considerable length her assertions that she would have particular difficulties because of her HIV status. He clearly read and properly analysed the Avert report. The statistics in that report showed the large numbers of citizens of Zambia who suffer from HIV. He was also correct to indicate that the report was more likely to show an up-to-date appreciation of the social factors for those suffering from HIV than those which the appellant remembered from her time in Zambia many years before. The appellant would be able, he found, to receive treatment for her HIV status. That was the conclusion which was clearly open to him. Moreover he had before him a young woman, clearly from a family that had been relatively prosperous, who had studied for her A-levels in Zambia and had undertaken part of an Open University course here. The appellant had shown herself to be resourceful in this country. She would have no difficulties with language in Zambia. There is nothing to indicate that she would not be able to find work there and would not be able to make social contacts there. Moreover he was correct to show that she would have the support of family and friends when she returned, at least initially. It is clear, I consider, that he did apply the correct test of "very significant obstacles". He did not state that the appellant would need to be destitute for her to succeed. He did weigh into account all relevant factors. His comment that she would not be destitute was merely a statement of fact. It is not the test which he was applying nor indeed was it a gloss on the consideration of the relevant phrase of "very significant obstacles".

13. He was correct to find that the appellant could not succeed under the Rules. Moreover he did properly consider her application outside the Rules. He was entitled to consider the public interest in the appellant's removal – this was a woman who had overstayed for many, many years and at least eight years had passed before she made any application for leave to remain. Moreover, the reality is that this was not a case where the Secretary of State sat on an application and made no decision thereon for a lengthy period of time. The Secretary of State properly responded to each application promptly within a few months. The Secretary of State, when refusing the appellant's applications, indicated that she should leave the country. She did not do so. I do not consider that the fact that after each occasion she was not forcefully removed indicates a disregard by the Secretary of State when considering the public interest in removal. I therefore do not consider that the fact that the appellant was not removed lessens the public interest in the removal of someone who came to Britain as an adult and must fully have been aware that she was remaining without authority. I therefore find that there is no material error of law in the determination of the Judge of the First-tier Tribunal and I dismiss this appeal.

No anonymity direction is made.

Signed Date: 20 February 2018

Deputy Upper Tribunal Judge McGeachy