



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27453/2016

THE IMMIGRATION ACTS

Heard at the Cardiff Civil Justice Centre
On 11 September 2018

Decision & Reasons Promulgated
On 14 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

CECILA [M]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Dickenson of Furdson Knapper Solicitors.

For the Respondent: Mr Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 The appellant, a national of Zambia, appeals against the decision of Judge of the First tier Tribunal O'Brien dated 31 August 2017 dismissing her appeal against the respondent's decision of 3 November 2016 refusing leave to remain and refusing her human rights claim.

- 2 It is to be noted that in the proceedings before the judge there was a second appellant, Ms. NW, the appellant's adult daughter. Indeed in some of the quotes below from the judge's decision, reference is made to 'the second appellant'. The judge dismissed both appeals. However, the notice of appeal to the Upper Tribunal, and the grounds of appeal challenging the judge's decision relate to the present appellant only. Therefore, although the decision of Upper Tribunal Judge Allen dated 29 March 2018 granting permission to appeal to the appellant erroneously names both the appellant and her daughter as appellants, both parties before me today accept that there is no appeal before the Upper Tribunal brought by the daughter. I will issue a separate notice in that matter to that effect.
- 3 The appellant arrived in United Kingdom in March 2013, entering as a visitor. The appellant is married to SC, a British citizen, and they had lived in Zambia together for some years prior to their entry to the UK in March 2013. SC had run a business there. Their visit to the UK was stated to be for the purpose of visiting SC's elderly mother.
- 4 However, shortly after the appellant's arrival in the United Kingdom, she required complex surgery for a form of facial cancer. The consequences of her surgery mean that she is required to wear an obturator - a prosthetic which replaces the roof of her mouth. The appellant has also had other health problems in the UK.
- 5 The appellant made an application for leave to remain on 18 December 2014. As this present appeal to the Upper Tribunal raises a question as to whether the judge dealt with the issues before him adequately, it is appropriate to consider in some detail the nature of the application which resulted in the decision under appeal. The application was made on the basis that she was the spouse of a British national, and there were insurmountable obstacles to family life continuing outside of the UK, relying specifically on section Ex1(b) of Appendix FM of the immigration rules.
- 6 The insurmountable obstacles said to exist were (see representations dated 18 December 2014 at page A41 of respondent's bundle) that any relocation to Zambia would be detrimental to the health of the appellant. It was said that the appellant required ongoing follow-up for a total of five years after the 2013 surgery. Reference was made to chapter 8 of the Immigration Directorate Instructions that factors which might be relevant to the consideration of whether insurmountable obstacles existed included the impact of a mental or physical disability and that a physical or mental disability could be such that in some circumstances that could lead to very serious hardship for example due to the lack of healthcare such that it amounts to an insurmountable obstacle. It was argued that not only was the medical condition of the appellant in itself an insurmountable obstacle due to a risk of her health worsening, but also the lack of medical facilities in Zambia also amounted to an insurmountable obstacle.
- 7 It was also argued that removal of the appellant from the UK would amount to a breach of the right to family and private life of the appellant and SC within the

meaning of Article 8 ECHR. At paragraph 4 of the representations, on page A42 of the respondent's bundle the appellant refers to the case of Chikwamba [2008] UK HL 40, asserting that it would only be comparatively rarely, certainly in cases involving children should an article 8 appeal be dismissed on the basis that it would be proportionate and appropriate to apply for leave from abroad. However, the argument then progresses to argue that it would be disproportionate to remove the appellant from the UK and require the family including SC to relocate to Zambia.

- 8 This application resulted in a decision of the respondent dated 26 February 2015 refusing the application for leave to remain but not granting a right of appeal. The appellant issued judicial review proceedings, resulting in a consent order in which the respondent agreed to reconsider the application. The reconsideration of the application has resulted in the decision of 30 November 2016.
- 9 The grounds of appeal against the respondent's decision, bringing the appeal to the First tier Tribunal, argue, in summary that there were insurmountable obstacles to family life continuing outside the UK and the paragraph Ex1(b) of Appendix FM was satisfied. It was argued that the lack of medical facilities in Zambia amounted to an insurmountable obstacle to a family life continuing outside the UK [Grounds, paragraphs 7 - 8]. No argument was advanced that the refusal of the human rights claim amounted to an interference with the private life of SC in United Kingdom. There is a skeleton argument setting out the way in which the appeal was argued before the judge. This mirrors the arguments set out in the grounds of appeal.
- 10 In determining the appeal the judge directed himself in law, making reference to cases in Article 3 ECHR, including GS (Article 3 - health - exceptionality) India [2011] UKUT 35 (IAC), and GS and EO (Article 3 - health cases) India [2012] UKUT 397 (IAC). Further, lengthy extracts were set out from both Akhalu (health claim: ECHR Article 8) Nigeria [2013] UKUT 400 (IAC), and GS (India), & Ors v The Secretary of State for the Home Department [2015] EWCA Civ 40 as to interrelationship between Articles 3 and 8 in health cases.
- 11 The judge noted at [38] onwards as follows:

“38 As it is, the only reason being advanced why the appellant's removal would breach Article 8 ECHR is that the medical treatment the first appellant is receiving in United Kingdom is not available in Zambia. Even if that were right, and I am prepared to accept that she is unlikely to receive the same standard of care in Zambia, the first appellant's circumstances fall well short of those which would engage Article 3 ECHR.

39 Of course, a case can engage Article 8 ECHR even if it fails under Article 3; however, such a case must comprise more than merely health issues. Removal must otherwise constitute an interference in the right to respect for family and private life, in respect of which the health issues fall to be considered when assessing proportionality.

40 In this case, however, little else is argued. In fairness I must consider the consequences of the first appellant's removal in the round. Clearly, if (SC) could not go with her, there will be a manifest interference in the couple's family life. However, he has previously lived and worked in Zambia and until two years ago owned a lift engineering firm. I have heard no cogent reason why SC could not set himself up again in business or otherwise find work. The couple had intended, they say, to find a new place to rent after that candidate in 2013...

41 As for the health problems facing the first appellant she has survived for over four years now after her operation without any recurrence of the Council. The five-year period of regular follow-up appointments is nearly over. There is no proper evidence that the obturator could not be maintained and refitted in Zambia. There are some, albeit fewer, cancer treatment facilities in Zambia. Even if there were none the respondent has indicated that it is not proposing to impose a reentry ban and so the first appellant could travel back treatment. In any event the first appellant would not be facing any immediate prospect of an inhumane or undignified period of suffering or death. The first appellant's health situation does not in my judgment engage Article 8 or, for the same reasons, constitute insurmountable obstacles as defined in section EX of Appendix FM.

42 Even if the first appellant's removal constituted an interference in the families right to respect for family and private life, the removal decision was taken in accordance with the immigration rules in order to maintain effective immigration controls. The appellant's presence in the United Kingdom has been precarious throughout. The first appellant has been extensively reliant on NHS services and so has not been financially independent. I am entirely satisfied in the circumstances that the decision is proportionate."

12 The appellant applied for permission to appeal to the Upper Tribunal. Her initial application was refused by Judge of the First tier Tribunal EM Simpson in a decision dated 13 November 2017. The application was renewed in an application dated 13 December 2017. The various paragraphs and subparagraphs of the grounds seem to overlap somewhat and are repetitive, but they appear to argue, in summary, that the judge erred in law:

- (i) in failing to consider whether the respondent's original decision was 'in accordance with the law', in having failed to consider the appellant's potential satisfaction of paragraph Ex1(b) of Appendix FM;
- (ii) in limiting his consideration to the appellant's case under article 8 ECHR to her health issues, thereby leaving out of account any effect on the appellant's removal on her relationship with her husband, and the appellant's ties to the UK including her involving the local church, social events and a large friendship circle;

- (iii) in appearing to consider the appellant's health problems only in the context of Article 3 ECHR, and failing to consider whether her health problems may amount to insurmountable obstacles to her family life continuing outside the United Kingdom, including problems accessing healthcare for the appellant, and any hardship SC may experience attempting to relocate to Zambia given his age, employment prospects and health;
- (iv) in failing to consider the effect of the decision on SC's enjoyment of his private and family life in the UK, and failing to consider his close relationship with his elderly mother, his age and health; and
- (v) in failing to consider whether the appellant's health problems, and SC's age and difficulty in re-entering the workforce in Zambia would constitute very significant obstacles to their integration into Zambia under para 276ADE(1)(vi).

13 I heard submissions from the parties. Ms. Dickinson relied on the grounds of appeal and Mr. Howells opposed the appellant's appeal.

Discussion

14 During the course of discussion with the parties I noted that it had been asserted within representations that SC was working in the UK and financially supporting his family. It transpires that in the tax year ending April 2017 SC earned £24,285 (P60 at page 123 of the appellant's bundle), ie in excess of the financial eligibility requirement in Appendix FM of £18,600.

15 Although the case Chikwamba was obliquely referenced in the letter of representation stated 18 December 2014, it does not appear to have been argued in those representations, or in the grounds of appeal to the First-tier Tribunal, or in the appellant's skeleton argument to the First-tier Tribunal, or in the grounds of appeal to this Tribunal, that the appellant appears to satisfy the financial eligibility requirements for appendix FM, and that if the appellant returned to Zambia and made an application for entry clearance, this would be likely to succeed. That may then raise a query as to whether or not there was, following *SSHID v Hayat (Pakistan)* [2012] EWCA Civ 1054, a 'sensible reason' as to whether she should be expected to perform the administrative task of leaving the United Kingdom to make an application for clearance which had every prospect of succeeding. It seems surprising to me that such an argument has not been advanced on behalf of the appellant.

16 However, although it seems to me that such an argument may possibly have benefited the appellant, the judge can hardly be blamed for not considering the point, given that it has never been advanced, and it is not a *Robinson* obvious error for the judge to have failed to consider it, particularly in those circumstances. Mr Howell understandably indicated that he would object to any suggestion that the appellant

be permitted to rely on this argument, for example, by way of an application to vary the grounds of appeal to the Upper Tribunal. The issue is therefore not before me.

- 17 I find that the appellant's grounds of appeal do not disclose a material error of law in the judge's decision.
- 18 Ms. Dickinson did not seek to advance the first ground as summarised at [12] above. Following commencement of the immigration act 2014, an appeal cannot be brought on the ground that appealable decision is not in accordance with the law, for example by the respondent having considered an incorrect immigration rule. The ground of appeal available under s. 84 Nationality, Immigration and Asylum Act 2002 is whether the refusal of the human rights claim is unlawful under section 6 of the Human Rights Act 1998, in this case, on the grounds that it discloses a disproportionate interference with the appellant's private or family life. Although it is clear that the respondent failed to consider the application of section Ex1(b) of appendix FM in the decision of 30 November 2016, the judge was able to, and indeed did consider the potential application of that provision by considering the merits of the appellant's human rights claim and in considering whether there were insurmountable obstacles to family life continuing outside the UK. Ms. Dickinson was right abandoned ground (i).
- 19 I find that the remaining grounds of appeal do not disclose any material error of law in the judge's decision. In relation ground (ii), I do not find that the judge limited his consideration to the appellant's case under article 8 to health issues only. Insofar as the appellant complains that the judge did not give sufficient consideration to her private life in the United Kingdom, the judge set out the appellant's immigration history, and was clearly aware of how long she had been in the UK. I have set out above in some detail the way in which the appellant's application and appeal were argued.
- 20 I find that the judge gave a fair summary of the appeal when suggesting at [38] that the only reason being advanced as to why the appellant's removal would be a breach of Article 8 ECHR was that the medical treatment for her would not be available in Zambia. At [40] the judge observed that little else had been argued. However, he nonetheless proceeded to consider the potential consequences of the appellant's removal in the round. The judge concluded at the end of [40] that save for the health issues faced by the appellant there would be little interference with the couple's family and private life if they returned to Zambia. In all circumstances, the judge was not obliged to make any further reference to the appellant's claim to have private life ties in the UK, developed over a four-year period and said to include connections to her church. In any event, the judge gave reasons which were adequate in law at [42] as to why, even if the appellant's removal constituted an interference with her respect for family or private life, the removal decision was proportionate.
- 21 Further, I reject the appellant's suggestion in ground (iii) that the judge erred in law by considering her health problems only in the context of article 3 ECHR. The judge

gave a careful self-direction in law as to the relevant authorities at [26] - [30] . Further, at [39]-[41] the judge specifically considered the appellant's health problems in the context of Article 8, as opposed to Article 3. In any event, the appellant does not identify what factors the judge failed to take into account, and has not challenged the judge's findings that there is no proper evidence that her obdurator could not be maintained and refitted in Zambia.

22 Dealing with grounds (iv) and (v) together, representing the criticisms of the judge's consideration of SC's private or family life ties to the UK, and whether the couple may face very significant obstacles on return to Zambia, I have already indicated my agreement with the judge's description of how the case was argued before the First-tier Tribunal. No specific evidence was drawn to my attention during the hearing is to what SC's private life ties to the UK were or in what way any such evidence should have featured more in the judge's decision. Further, the judge considers at [40] that there was no cogent reason why SC could not set himself up again in business or otherwise find work in Zambia and there was no convincing reason why the couple should not be able to find further accommodation upon returning to Zambia now. This clearly amounts to a finding that there were no very significant obstacles to family life continuing outside of the UK.

23 I find that there are no material errors of law in the judge's decision.

24 The appellant's appeal is dismissed.

Signed:

Date: 12.9.18



Deputy Upper Tribunal Judge O'Ryan