



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05818/2019

THE IMMIGRATION ACTS

Heard at Field House
On 27 January 2020

Decision & Reasons Promulgated
On 13 February 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS T N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Smith, Counsel instructed by Kent Immigration & Visa Advice

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Zimbabwe born on 29 September 1965. She claims to have entered the UK on 27 February 2004 and claimed asylum on 15 January 2009.

This application was refused, her appeal was dismissed on 26 November 2009 and she became appeal rights exhausted on 8 January 2010. The Appellant made a number of further submissions, which were rejected. The most recent submissions were made on 16 April 2019, which were refused on 29 May 2019 with the right of appeal. The appeal came before First-tier Tribunal Judge Chana for hearing on 4 October 2019. In a decision and reasons promulgated on 11 October 2019 the judge dismissed the appeal.

2. The Appellant's asylum claim was based on the deteriorating country situation and economic situation and her political activity in the UK. The Appellant is married to a Zimbabwean national aged 66 years of age who has indefinite leave to remain in the UK. It was accepted by the judge at [53] of the decision that the Appellant has family life with her husband. Thus any removal of the Appellant from the UK would interfere with that family life. The Appellant's husband is unwell, he has been suffering from cancer which was currently in remission, accepted by the judge at [55], having been diagnosed and treated for lung cancer in 2017. However, there were concerns of reoccurrence and he continues to have regular scans and appointments, he takes medication, has recurrent chest infections as a result of his surgery and resulting radiotherapy treatment, and there is a prognosis of reoccurrence in terms of months to a couple of years, as a consequence of which the Appellant is his carer and supports him physically and emotionally.
3. The Appellant sought permission to appeal against the Judge's decision essentially on three grounds: firstly, that the judge failed to make findings on relevant issues, the ability of the Appellant's husband to use his UK state pension to pay for medical care in Zimbabwe, failing to find whether the ongoing monitoring and treatment the Appellant's husband needs now and may need in the future would be accessible in Zimbabwe, and whether treatment is available and affordable was clearly relevant to any consideration of the proportionality of the Respondent's decision; secondly, that the judge failed to take account of relevant considerations and that is whether the Appellant's husband would return to Zimbabwe in light of his evidence that he was afraid that he would not receive appropriate care and treatment and therefore could not return, and the judge erred in failing to consider whether his fear of return amounts to either an insurmountable obstacle or a compelling circumstance: see CL (India) [2019] EWCA Civ 748; and thirdly, the judge's approach to section 117B of the NIAA 2002 and the balancing exercise was erroneous in light of the judgment in Rhuppiah [2018] UKSC 58 at [49] and the failure by the judge to consider whether in the particular circumstances the public interest in removal could be outweighed by the Appellant's husband's health problems. No challenge was brought regarding the Judge's findings in respect of the Appellant's asylum claim.
4. Permission to appeal was granted by Upper Tribunal Judge Coker in a decision dated 19 December 2019 on the basis that:

"For the reason given in the grounds relied upon it is arguable that the decision of First-tier Tribunal Judge Chana on Article 8 and Section 117B of the NIAA 2002 are infected by error of law such that the decision on Article 8 should be set aside and re-made".

Hearing

5. At the hearing before the Upper Tribunal, Ms Everett acknowledged that there was a Rule 24 response but submitted it did not take matters much further. Ms Smith sought to rely on the judgments in *Agyarko* [2017] UKSC 11 and *CL (India)* [2019] EWCA Civ 1925. The parties were agreed that the grant of permission to appeal appeared to encompass all three grounds of challenge.
6. In respect of ground 1, Ms Smith submitted that Judge Chana's decision was not particularly lengthy and it was apparent she had failed to take account of relevant considerations and took into account immaterial considerations, e.g. her findings in respect of the Appellant's husband's pension do not go far enough. The judge failed to complete her reasoning in reaching her conclusions, which were at odds with the evidence that she had set out in the earlier decision, given that she found at [58] to [61] that there was a shortage of drugs and medical staff in Zimbabwe; that cancer drugs were expensive and that screening services were available for most forms of cancer but prohibitively expensive for most people and that there were shortages of chemotherapy drugs even in the private sector. She also found the Appellant's husband would not receive free treatment if his cancer returned or he needed further ongoing medical assistance. However, the judge went on to find that there was no evidence before her that the medical treatment and equipment he required were not available, they were available but expensive, however this finding does not reflect the very precarious nature of their availability and is inconsistent with her record of the evidence, e.g. at [60]. The test, which the judge did not correctly apply, was whether removal of the Appellant would lead to unjustifiably harsh consequences for her and in particular for her husband.
7. In relation to the manner in which the judge treated the issue of the Appellant's husband's pension, it was submitted that she did not manage this issue correctly. The level of the pension was not specified but given that the Appellant's husband has only been in the UK since 2006, there could at best only be fourteen years' worth of pension. The judge found there was no evidence that he would be unable to access this from Zimbabwe or be able to live from his income in Zimbabwe, but there was no consideration of the costs of his likely medical treatment.
8. Ms Smith submitted in response to a question from the Upper Tribunal that there was no evidence as to any other form of income apart from the pension income which was modest at best and that the judge had failed to properly analyse the affordability issue. Ms Smith reminded the Upper Tribunal that this was not an Article 3 case, the argument simply being whether removal of the Appellant would result in unjustifiably harsh consequences.
9. In relation to ground 3, Ms Smith submitted this was a technical point based on *Rhuppiah* (op cit). She submitted that the judge had made a straightforward misdirection and had failed to take account of the judgment in *Rhuppiah*, which was a material error because the judge had failed to properly conduct a balancing exercise

or consider the issues cumulatively and against the background of ill health. Notably the Appellant's husband had previously had cancer in 2010. No consideration was given to the fact he has been in the UK for fourteen years. He has returned to Zimbabwe because his first wife died and he needed to deal with her burial. He has adult children in both the UK and Zimbabwe but no consideration was given to his private life with his UK based children. His lung cancer diagnosis in 2017 postdates his trips to Zimbabwe.

10. Also material is the fact that the Appellant has endeavoured a number of times to regularise her stay but there was a five year delay by the Respondent in deciding her application. Ms Smith also sought to rely on the case of *CL (India) (op cit)* which found that subjective fear could not be taken into account at [37] but was analogous in light of [68] given the Appellant's husband's fear of a recurrence of his cancer based on the objectively based previous experience and information: see the Appellant's bundle at page 42. The Appellant's husband would like continuity of care and fears that he may not receive this in Zimbabwe in light of the healthcare system there and bearing in mind that he has been given a diagnosis that there is a real likelihood his cancer may return.
11. In her submissions, Ms Everett dealt with the last ground first and submitted that whilst it had been put to the Upper Tribunal that the judge had misdirected herself at [53] in relation to section 117 of the NIAA 2002 it was not straightforward and it was not accepted that the judge had fettered her ability to place weight on the decision and that the assertions made were not borne out by the ensuing considerations made by the First tier Tribunal Judge.
12. In relation to ground 1, Ms Everett submitted the judge was clearly aware that medical treatment in Zimbabwe was not going to be comparable to the medical treatment the Appellant's husband has been receiving but it was fair of her to find that there is treatment available. Ms Everett submitted there was no suggestion from the findings the judge had not taken that point on board and grappled with it, nor that her findings are perverse. She invited the Upper Tribunal to resist the ground that the judge had failed to complete the reasoning in relation to the medical evidence. It was clearly not possible for the judge to formulate a treatment plan for the Appellant's husband but she did grapple with the shortages and availability of treatment in the form of chemotherapy.
13. In respect of ground 2, Ms Everett submitted that this was a nuanced consideration, that the judge is making findings of fact based on the evidence but this is not going to be determinative. However, it was incumbent upon the judge to make findings of fact and this ground of challenge was not made out.
14. In reply, Ms Smith addressed Ground 1 and submitted that she was not seeking to argue that there was no treatment available, but whether or not it was accessible and the Judge had failed to consider this.
15. I reserved my decision, which I now give with my reasons.

Findings and reasons

16. I have concluded that the First tier Tribunal Judge erred materially in law for the reasons set out in Ground 3. There is no or no proper consideration by her of the statutory public interest considerations set out at section 117A-D of the NIAA 2002 except for the fact that the Appellant's immigration status has always been precarious. In fact she has had no leave at all and has been an overstayer since 8 January 2010; albeit she has made regular attempts to resolve her status by way of further submissions and there was a five year delay by the Secretary of State in deciding submissions made on 15 November 2012, which were not refused until 10 August 2017.
17. The Judge at [53] expressly accepted that the Appellant has family life with her partner. However, she failed to reach her decision on the proportionality of removal with regard to the material jurisprudence in respect of family life and the statutory public interest considerations as set out in *Rhuppiah* [2018] UKSC 58, their Lordships held as follows at [49] as to the limited degree of flexibility inherent in section 117A(2)(a) when considering a precarious immigration status pursuant to section 117B(5). Further consideration was recently given to the application of section 117B to family life where immigration status is precarious in *GM (Sri Lanka)* [2019] EWCA Civ 1630 and *CL (India)* [2019] EWCA Civ 1925, which provides *inter alia* as follows at [66]-[67]:

"66. Our conclusion on this point accords with the recent decision of the Court of Appeal (Green and Simler LJ) in GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630, where the tribunal judge was held to have erred in law by treating the "little weight" provisions of section 117B(4) and (5) as relevant to family life as well as private life created when the appellant's immigration status was precarious, with the result that the tribunal "wrongly discounted the weight to be attached to the family rights relied on in the proportionality assessment" (para 37).

67. ...The Court of Appeal clearly held that the weight attached to all the family rights relied on had been wrongly discounted. In the same way we are satisfied that the Upper Tribunal judge in this case erred in law in so far as he treated the fact that Ms Lal's immigration status was precarious when her relationship with her husband was formed as requiring him to attach little weight to their right to respect for their family life.

18. I further find that the Judge erred materially in law in that she failed to apply the correct legal test when considering Article 8 outside the Rules ie whether refusal would result in unjustifiably harsh consequences for the Appellant or her partner, despite making reference to *Agyarko* at [51]. The Court of Appeal in *CL (India)* (*op cit*) held as follows at [68]-[69]:

"68. In considering, however, whether there are "exceptional circumstances", the applicable test is whether refusing leave to remain would result in "unjustifiably harsh consequences" for the applicant or their partner, such that refusal would not be proportionate: see the passage from the Secretary of State's instructions to officials quoted at paragraph 11 above

and the Agyarko case at paras 54-60. The essential difference (reflected in the word "unjustifiably") is that the latter test requires the tribunal not just to assess the degree of hardship which the applicant or their partner would suffer, but to balance the impact of refusing leave to remain on their family life against the strength of the public interest in such refusal in all the circumstances of the particular case.

69. The Upper Tribunal did not undertake such an assessment. This was another error of law which flowed from the errors already identified. From the judge's point of view, the question of proportionality had in effect already been answered by his mistaken understanding that he was required by law to attach little weight to the couple's relationship and his previous finding that there were no insurmountable obstacles to Ms Lal continuing family life with her husband outside the UK. As a result of those errors, the judge failed to assess the factors relevant to the question of proportionality in the circumstances of this case."

19. I am not persuaded that Ground 2 – the failure to make findings relevant to Article 8 of ECHR and Ground 3 – the failure to take into account relevant considerations are made out, but in light of my findings above as to the failure by the First tier Tribunal Judge to apply the correct legal tests in respect of the Appellant's family life with her partner and the statutory public interest considerations and to consider whether removal of the Appellant would have unjustifiably harsh consequences for the Appellant or her partner, the decision cannot stand as the Judge's findings are infected by the failure to apply the correct tests.
20. The decision and reasons of First tier Tribunal Judge Chana contains material errors of law and is set aside, for the reasons set out above.

Notice of Decision

The appeal is allowed to the extent that the appeal is remitted for a hearing *de novo* in respect of Article 8 only.

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 *Rebecca Chapman*

Date 10 February 2020

Deputy Upper Tribunal Judge Chapman