



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/20707/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 23 March 2021

On 31 March 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LINDIWE JUDITH BANDA

(ANONYMITY ORDER NOT MADE)

Respondent

DECISION AND REASONS (V)

For the appellant: Mr A McVeety, Senior Presenting Officer

For the Respondent: Mr B Chimpango, Crown & Law Solicitors

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the

conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. To avoid confusion, for the purpose of this decision I have referred below to the parties as they were before the First-tier Tribunal.
2. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 11.11.20 (Judge Malik), allowing on human rights grounds the appellant's appeal against the decision of the Secretary of State, dated 27.11.19, to refuse leave to remain.
3. The relevant background is that the appellant is a national of Malawi with date of birth given as 30.11.59. She last entered the UK on 18.7.18 on a family visit visa. Within the limit of stay of 6 months, on 28.11.18 she applied for leave to remain on human rights grounds, in order to support her partner, Mark Banda, who was then suffering from terminal bladder cancer. The application was refused on the basis that the appellant did not meet the requirements of the Rules and there were no exceptional circumstances justifying a grant of leave outside the Rules.
4. Before the appeal could be heard (22.10.20), Mr Banda had passed away, on 16.6.20. At the appeal hearing, the appellant explained that she nevertheless sought leave to remain for a short period, in order to finalise his pension arrangements, after which she proposed to return to Malawi.
5. The grounds argue that in allowing the appeal on private life grounds, the judge failed to give adequate reasons. The reason given by the appellant for wanting to remain a short period was an 'administrative process which is capable of being completed remotely and therefore it is unclear why her presence in the UK is considered necessary and to find so is a misdirection in law.'
6. The grounds further submit that once it was concluded that the appellant was unable to satisfy the Rules, it was incumbent on the judge to provide reasons why the appellant's case was considered so exceptional as to warrant a grant of leave outside the Rules. It is argued that the alleged inability of the appellant to pay for a return flight is insufficient to displace the public interest in enforcing immigration law and to allow the appeal on this basis borders on perversity and is a misdirection in law.
7. Permission to appeal to the Upper Tribunal was granted on 1.12.20, on the basis that the grounds as drafted were arguable and that "*Article 8 private life considerations are limited to cases involving physical and moral integrity, Patel, and it is difficult to see what those were in this appeal or why the appellant's presence was required.*"
8. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

9. The unusual facts of this case included that although married to Mr Banda, and the respondent accepted that they had a genuine and subsisting relationship, the appellant did not normally live with her partner. Instead, she made a series of visits to him in the UK, using a visit visa, before returning each time to Malawi. The submissions of her representative at the First-tier Tribunal appeal hearing were to the effect that she did not want to stay longer in the UK than a "few months" and only to do so in order to 'sort out' her deceased husband's affairs. It was said that she had no reason to stay, "she wanted to wrap everything up, not overstay."
10. Judge Malik allowed the appeal, stating at [33] of the decision, "*I am satisfied at the time of application the appellant did meet the requirements of the rules and whilst finely balanced, given the compassionate circumstances, I find Article 8 private life is engaged and that the respondent's decision, in the circumstances of this particular appeal, is disproportionate.*"
11. The Immigration Rules the judge was referring to related to the application for leave to remain in the UK as a partner, pursuant to Appendix FM. At [28], the judge found that there were insurmountable obstacles in accordance with EX1 as defined by EX2, "*such that the parties would have faced very significant difficulties in continuing their family life in Malawi – which could not be overcome and/or would have entailed very serious hardship for them. For this reason I find the appellant did then meet the requirements of the rules.*"
12. Although the judge found that insurmountable obstacles were met under EX1, the appeal could not be allowed on that basis. The only ground of appeal was on human rights, article 8 ECHR, which had to be assessed as at the date of the hearing. As the judge granting permission pointed out, article 8 private life can only be engaged on grounds of moral or physical integrity. Whilst Judge Malik had understandable sympathy for the appellant's circumstances, nothing in the decision demonstrated how article 8 private life could even engage article 8, particularly when s117B of the 2002 Act is considered to the effect that little weight should be given to such private life when her immigration status was always temporary and precarious. Remaining to sort out her late husband's financial affairs does not begin to engage article 8.
13. In the premises, the appeal should have been dismissed. However, the fact is that the appellant has been in the UK since her application in 2018 and has now had some 9 months to sort out her husband's affairs. Mr Chimpango advised me that this had now been completed and that she was booked on a flight to return to Malawi on 22.4.21, subject to Covid pandemic travel restrictions.
14. I make it clear that the appellant has exercised her lawful right to appeal the decision of the respondent to the First-tier Tribunal and subsequently to the Upper Tribunal, during which time up until the promulgation of this decision she has enjoyed an extension to her lawful leave. Mr Chimpango explained that the appellant wanted to be able to return to Malawi without any stain on her immigration history, which is understandable. I am satisfied that the respondent will not regard the short period of time between the eventual promulgation of this decision and her departure as a stain on her character or immigration history. Mr McVeety confirmed the same, pointing

out that the Secretary of State is taking no action against those unable to leave the UK due to Covid restrictions. In the circumstances, the appellant has achieved all that she could and nothing in this decision should prevent any future application for a visit to the UK in the future (she has other family here).

15. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal so that it must be set aside to be remade by dismissing the appeal.

Decision

The appeal of the Secretary of State to the Upper Tribunal is allowed.

I set aside the decision of the First-tier Tribunal.

I remake the decision in the human rights appeal by dismissing it.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 23 March 2021