



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/00152/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 25 May 2022**

**Decision & Reasons Promulgated
On 15 June 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

**LW (JAMAICA)
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Ms. H Gilmour, Senior Presenting Officer

Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of Judge of the First-tier Tribunal Row ("the Judge") sent to the parties on 20 April 2021 dismissing his appeal on human rights (articles 3 and 8 ECHR) grounds. The challenged decision issued by the respondent is dated 6 December 2019.
2. Notice of hearing was sent by the Upper Tribunal to the parties on 10 May 2022. On the following day the Upper Tribunal received an email from Brushstrokes Sandwell Community Project ('Brushstrokes Sandwell'), an organisation regulated by the Office of the Immigration Commissioner, who are on record as representing the appellant. Mr. Salman Mirza confirmed on behalf of Brushstrokes Sandwell that the appellant was unable to attend the hearing because of health concerns, and no-one from the organisation could attend because of limited staff capacity. It was stated that a request had previously been made that the appeal be considered 'on the papers', though this is understood to relate an earlier request that the First-tier Tribunal consider the appeal without a hearing.
3. Through the Upper Tribunal's administrative team at Field House, I informed the appellant and Brushstrokes Sandwell that I understood the health reasons underpinning the appellant's inability to attend the hearing. Whilst noting the Tribunal's ability to consider an appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I considered the overriding objective to act fairly to be such that the respondent should properly be asked to express a view as to whether there was agreement that the matter be considered on papers. This request was sent to the parties on 17 May 2022, but no response was received from the respondent and so the matter continued to be listed as an oral hearing.
4. Ms. Gilmour did not take any point as to the appellant's non-attendance at the hearing.

Anonymity

5. An anonymity order was made by the Judge in his decision of 20 April 2021 and no party requested that it be set aside. I therefore confirm the anonymity order at the beginning of this decision.

Facts

6. The appellant is a Jamaican national who is presently aged 74. He entered the United Kingdom with leave as a visitor on 20 December 2003. It is asserted in the documents before me that his entry to this country followed the break-up of his marriage, his wife having left him to commence a relationship with another man.
7. The appellant made an in-time application for leave to remain as a dependent relative, but the respondent rejected it by a decision dated 21 June 2004. Soon afterwards, the appellant again applied for leave to

remain as a dependent relative and the application was refused with no right of appeal on 15 July 2004.

8. The appellant subsequently dropped off the respondent's radar for some fifteen years before applying for leave to remain on human rights grounds by means of an application dated 26 September 2019. The human rights application relied primarily upon the appellant's medical condition, his having been diagnosed with multiple myeloma, a blood cancer, some months previously.
9. A letter was subsequently forwarded to the respondent by the appellant's then legal representatives, Genesis Law Associates Solicitors Ltd, dated 22 October 2019. The letter detailed, *inter alia*:

'[The appellant] is currently an inpatient at Heartlands Hospital. He has recently had a bone marrow transplant for his disease [sic] multiple myeloma and as such is severely susceptible to infections. The disease is expected to relapse and he will need continuing treatment. Furthermore consideration has to be given to the ability for his home country to treat his cancer when his [sic] relapses and for a 71 year old gentleman this will certainly impact his survival prognoses and will almost certainly result in an untimely death as, has [sic] stated in the hospital letter dated 19 September 2019, the hospital '... will certainly not send his cells over to Jamaica and thus also implies that once we have initiated the treatment we would have to see the full course of his disease which takes six to eight years ...'

Due to his ongoing medical condition, which will never improve, returning to Jamaica is not an option for [the appellant], as he has no family or home to return to and is heavily reliant upon family and friends in the United Kingdom for his basic everyday essential need. [The appellant] has undergone a stem transplant with a further transplant expected should his condition deteriorate, he is also undergoing chemotherapy.'

10. Accompanying the application were hospital notes from Heartlands Hospital, Birmingham and a letter from Dr Kishore, consultant haematologist, Good Hope Hospital, Sutton Coldfield:

'[The appellant] has been treated by us for the last few months with myeloma. His family story is interesting as he told me he had no living relatives. He had a nephew called [T] but I am not so sure as to the interactions between these two and I have been told informally that [T] employs [the appellant] for certain jobs. [The appellant's] medical condition is precarious, he has just had a transplant and is now complicated with para-flu infection. This gentleman is in dire need for help and will probably perish if he were to live alone or not have support over the next three months. As such he cannot stay in the hospital and we will be discharging him in the next couple of weeks. He probably needs to use Lawyers etc. to get his home office issues sorted out in which case he may be able to recourse to public funds. I will encourage our social services and other teams to help.

Coming back to his disease condition myeloma does relapse within two or three years and at that stage needs a second transplant he will also

need chemotherapy. I am not so sure if transplant would be a feasible option for him and we would certainly not send his cells over to Jamaica and thus that also implies that once we have initiated the treatment we have to see the full course of his disease which takes over six to eight years. I write this in good faith and our initiation of treatment he had an NHS number and there was no reason to suspect that he was staying in this country illegally and thus I am keen that we do not cause detriment to his treatment by just stopping everything after his current transplant discharge and forcing him to leave these islands. I hope this helps him in his applications and I am available to answer any questions that might be raised.'

11. The respondent refused the application by her decision dated 6 December 2019 concluding that no exceptional circumstances existed. It is appropriate to observe that the respondent accepted that the appellant was not fit to travel.
12. The appeal came before the Judge sitting in Birmingham on 6 April 2021. Correspondence received by the First-tier Tribunal from Brushstrokes Sandwell confirmed that the appellant was "in a very confused state" and concern was given as to his understanding of proceedings. Further medical evidence was provided confirming that the appellant was undergoing a weekly chemotherapy regime and was suffering neuropathic pain, originating as a side effect of his chemotherapy.

Grounds of Appeal

13. Grounds of appeal were filed on behalf of the appellant by Brushstrokes Sandwell. They are very short and primarily rely upon Dr Kishore's observation that without funds and access to medication the appellant's life would be reduced to less than a year.
14. The appellant was granted permission to appeal by Judge of the First-tier Tribunal O'Garro, who observed in her reasoning the Supreme Court judgment in *AM (Zimbabwe) v. Secretary of State for the Home Department* [2020] UKSC 17, [2021] AC 633, and the applicable test to be applied.

Decision

Article 3

15. The Supreme Court held in *AM (Zimbabwe)* that the proper approach to article 3 ECHR was modified by the European Court of Human Rights in *Paposhvili v. Belgium* (Application No. 41738/10) [2017] Imm AR 867. The relevant test is whether removal would give rise to a real risk of a serious, rapid and irreversible decline in the person's state of health resulting in intense suffering, or to a significant reduction in life expectancy. This does not require that death be imminent in the event of removal.
16. The Judge was mindful of the test when considering the appellant's article 3 appeal:

- '18. I take into account the guidance in **AM (Zimbabwe) and Secretary of State for the Home Department [2020] UKSC 17**. To succeed under Articles 2 or 3 it is for the appellant to establish that there is a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of his being exposed to a serious, rapid, and irreversible decline in his state of health resulting in intense suffering, or to a significant reduction in life expectancy
19. The evidence before me is that the appellant is suffering from a serious condition. The last evidence produced by the appellant was that he was receiving chemotherapy. It was anticipated that he could live up to 14 years if his treatment was successful.
20. Nothing has been put before me to show that the treatment which the appellant requires would not be available to him in Jamaica and that he would not be able to obtain approach support from the state or from family there. There is no reason to assume that Jamaican doctors are less well-trained or able than those in the United Kingdom. There is no reason to assume that the recognized clinical treatment for myeloma in Jamaica is any different to that in the United Kingdom.
21. I do not find on the evidence before me that there would be an absence of appropriate treatment in Jamaica and that such lack would result in rapid and irreversible decline in the appellant's state of health or would result in a significant reduction in life expectancy.
22. The appellant therefore does not succeed under Articles 2 and 3.'
17. I observe that article 3 concerns an absolute right and that a minimum level of severity must be shown to meet the high threshold established by the article. The burden of proof is on the person challenging removal to show substantial grounds that they face a real risk of treatment breaching article 3. Whether the minimum level of severity is met by an appellant is relative and depends on all the circumstances of the case. Once an appellant has raised a *prima facie* case, the respondent can seek to counter it by obtaining evidence to dispel any serious doubts that the appellant may face an article 3 breach.
18. In *AM (Art 3; health cases) Zimbabwe* [2022] UKUT 00131 (IAC), the Upper Tribunal noted that in article 3 health cases two questions emerge from the recent authorities of *AM (Zimbabwe)* in the Supreme Court and the Grand Chamber judgment in *Savran v. Denmark* (Application No. 57467/15) [2021] ECHR 1025 (7 December 2021) in respect of the initial threshold test. Paragraph 1 of the decision's headnote details:
- (1) Has the person (P) discharged the burden of establishing that he or she is 'a seriously ill person'?
- (2) Has P adduced evidence 'capable of demonstrating' that 'substantial grounds have been shown for believing' that as 'a seriously ill person', he or she 'would face a real risk':

- [i] 'on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,
- [ii] of being exposed
 - [a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or
 - [b] to a significant reduction in life expectancy'?

19. The first question is a relatively straightforward issue and would generally require clear and cogent medical evidence from treating physicians in the United Kingdom. It is apparent from the medical evidence placed before the First-tier Tribunal that the appellant is a seriously ill person. Myeloma is a type of bone marrow cancer which causes a wide range of attendant health problems. Treatment can often help to control the condition for several years, but most cases of multiple myeloma cannot be cured.
20. The second question is multi-layered. In relation to paragraph 1(2)[ii][a] of the headnote in *AM (Art 3; health cases) Zimbabwe* above, it is insufficient for an appellant to merely establish that his or her condition will worsen upon removal or that there would be serious and detrimental effects. What is required is intense suffering. The nature and extent of the evidence that is necessary will depend on the particular facts of the case.
21. I am satisfied that in this matter the minimum requirement was for the appellant to provide evidence to establish that he would not be able to access relevant treatment in Jamaica upon his return. As noted by the Judge, there was a dearth of any evidence on this point. It is unfortunate that the respondent decided to provide evidence addressing breast cancer care in Jamaica to the First-tier Tribunal, which was clearly irrelevant to the medical issue being examined. However, as confirmed by the Upper Tribunal in *AM (Art 3; health cases) Zimbabwe*, it is for the appellant to meet the burden in respect of the second question. I conclude that before the First-tier Tribunal the appellant came nowhere close to satisfying the burden placed upon him and so the Judge did not err in his consideration of the article 3 appeal.
22. The article 3 appeal is dismissed.

Article 8

23. In respect of article 8 ECHR, the Judge found, *inter alia*:

'30. Whilst one has sympathy with the appellant because of his condition and can recognize Dr Kishore's ethical discomfort, it is the case that the appellant has been receiving what must be expensive treatment and has produced no evidence that he has paid for any of it. His treatment has been at the cost of the United Kingdom taxpayer. It is likely to have been to the detriment of other patients who are entitled to treatment by the NHS and whose treatment has been delayed because of the appellant. It has been at a time when the NHS is struggling to meet its obligations and the United Kingdom has been borrowing heavily in

order to finance its obligations. If the appellant remains in the United Kingdom he will continue to require treatment and will inevitably be reliant upon state support of some kind if he does remain. This weighs heavily against him in assessing proportionality.

31. Any private life which the appellant has established in the United Kingdom has been established at a time when his immigration status was at best precarious and for most of the time unlawful. I put little weight on it for that reason.
 32. The maintenance of effective immigration controls is in the public interest. The appellant remained in the United Kingdom without leave and indeed criminally. It cannot be in the interest of the United Kingdom for people simply not to leave when their leave expires. It would cause chaos. It is contrary to good order and governance. The economic cost of the appellant to the United Kingdom has been substantial and will increase if he remains. All this weighs heavily against the appellant in assessing proportionality.
 33. Taking all these matters into account, whilst I accept that the appellant has established a private life in the United Kingdom which is interfered with by the decision under appeal, I find that the decision is legitimate. I further find that such interference is necessary in a democratic society both for the economic well-being of the country and for the protection of the rights and freedoms of others and that the interference is proportionate to these legitimate public ends on the facts of this appeal.'
24. In reaching those findings the Judge addressed the evidence filed with the Tribunal as to the appellant's circumstances in Jamaica:
- '14. The appellant has not provided a statement to set out what his circumstances would be in Jamaica. It is suggested in the notice of appeal and in one of the hospital letters that the appellant has no relatives in Jamaica. He has given no written statement or oral evidence of this. He has provided no evidence of what medical treatment is available in Jamaica and whether that treatment would be provided to him free or would have to be paid for. He has provided no evidence of the availability of state benefits or other support in Jamaica.'
25. Ms. Gilmour, whose assistance in this matter was greatly appreciated, accepted that it is clear from the limited evidence provided that the appellant should properly have been treated as vulnerable and the evidence considered holistically.
26. Such failure is relevant when considering the evidence of Dr Kishore referred to by the Judge at [14]. In his letter of 19 September 2019 Dr Kishore observed that he had been informed during meetings held over previous months that the appellant had no close relatives, save for his nephew residing in the United Kingdom. A clear understanding of the conversations is that the appellant has no family in Jamaica to provide aid and support to him upon return. I observe that these conversations took

place before the appellant applied for leave to remain on 26 September 2019. It is clear from the papers provided to the Tribunal that following the appellant's diagnosis of multiple myeloma efforts were made to secure him social worker support from the vulnerable adult team. It was then observed that difficulties arose in securing additional support because the appellant enjoyed no valid leave to be present in this country and consequently a healthcare worker directed the appellant to an immigration lawyer in order to secure status in this country. Such events took place in or around the middle of September 2019, and so some time after the appellant first engaged with Dr Kishore and the conversations occurred. I am satisfied that at the time he informed the doctor that he had contact with only one relation, who resided in this country, the appellant was not seeking to influence third-party evidence for the purpose of securing leave to remain in this country.

27. I have sympathy for the Judge, who had a difficult case placed before him and was not aided by submissions from a representative. I am also mindful of the fact that he did not enjoy the benefit of the recent guidance provided by a Presidential panel of this Tribunal in *HA (expert evidence, mental health) Sri Lanka* [2022] UKUT 111 (IAC), where it was observed that weight could properly be placed upon medical records prepared before a human rights or international protection claim is made as it may well be that the discussions recorded were not designed to influence efforts to remain in this country.
28. I indicated to Ms. Gilmour at the hearing that both the failure to consider the appellant's evidence holistically through the prism of his vulnerability and the failure to adequately assess the evidence of Dr Kishore were *Robinson* obvious issues: *R v. Secretary of State for the Home Department, ex parte Robinson* [1998] Q.B. 929. Whilst Ms. Gilmour did not accept that the identified errors were determinative, she accepted that on their face they were *Robinson* obvious and should properly be considered by this Tribunal.
29. I am satisfied both errors of law were material. The Judge found at [23] that there were no very significant obstacles to the appellant's integration into Jamaica and so the appellant could not succeed under paragraph 276ADE(1)(vi) of the Rules. The reasoning provided as to there being no very significant obstacles existing were, in part, based upon the judicial conclusion that the appellant had not established that he did not have contacts or relations in his home country. However, such finding is materially flawed consequent to inadequate weight being placed upon Dr Kishore's observations as to conversations held with the appellant prior to the making of the application for leave to remain. This error of law flowed from a failure to consider the appellant as being vulnerable in respect of his evidence, so requiring evidence to be assessed holistically: *AM (Afghanistan) v. Secretary of State for the Home Department* [2017] EWCA Civ 1123, [2018] 2 All E.R. 350. In the circumstances the article 8 decision cannot properly stand and must be set aside.

Remaking the Decision

30. Ms. Gilmour had no objection to my proceeding to remake the decision and she made helpful, succinct submissions. She also provided me with a copy of the respondent's CPIN: *Jamaica: Medical and healthcare issues (Version 1)* (March 2020). The appellant had previously expressed that he wished for the matter to be considered in his absence.
31. I am satisfied that the outcome of the appeal ultimately rests upon my conclusion as to whether the appellant satisfies paragraph 276ADE(1)(vi) of the Rules, namely as to whether there would be very significant obstacles to his integration upon return to Jamaica. I observe the well-known judgment of Sales LJ (as he then was) in *Secretary of State for the Home Department v. Kamara* [2016] EWCA Civ 813, at [14], and in particular whether the appellant would have a capacity to participate in life in Jamaica so as to have a reasonable opportunity operate on a day-to-day basis and build up within a reasonable time a variety of human relationships to give substance to the his private life.
32. It is clear from the evidence provided that the appellant has, in the main, been positively engaged with his healthcare in the United Kingdom. I am satisfied that he understands the importance of such engagement, as he suffers from a life-threatening illness with no cure. The only occasions when he has not successfully engaged with medical treatment have been when he has been without an address; either homeless or moving between properties. It is understandable that problems may then occur in securing required weekly medication. The medical evidence identifies real concern on the part of health care professionals when the appellant has not engaged with his treatment. This is understandable in light of the seriousness of the medical condition. I am mindful that his illness is one that can be controlled but cannot be cured and so there is a constant understanding by both a sufferer and healthcare professionals that the cancer can return and place life at risk. I take judicial note that even with appropriate health care, only one in two adult males survive a diagnosis of myeloma after five years. One third survive for over ten years.
33. The evidence filed with the Tribunal clearly establishes that the appellant has on at least one occasion had a stem cell transplant and has undergone chemotherapy. Dr Kishore has confirmed the real likelihood that the appellant will require a second transplant with accompanying chemotherapy.
34. I am also satisfied as to the information provided to the Tribunal by Brushstrokes Sandwell that the appellant presents in a confused mental state.
35. I accept that Dr Kishore has accurately recorded the essence of the conversations he had with the appellant at the time of the diagnosis and that the appellant was honest in stating that he had no contact with family members save for a nephew residing in this country with whom he has

limited contact. There was no reason for him to embellish such circumstances to a treating doctor at the relevant time. I am therefore satisfied that he has no family residing in Jamaica who can provide him with support, either emotional or financial, upon return. Ms. Gilmour tentatively sought to rely upon the fact that in an application made in 2004 the appellant had confirmed that he had a wife and child in Jamaica. However, he has been in this country for some nineteen years and his wife and child have not joined him. Ms. Gilmour accepted that such fact was strongly indicative that the marriage was long over. There is no evidence that the appellant has any relationship with his child in Jamaica, whom he left behind in 2003 when he travelled to this country. I am satisfied that the appellant was being truthful when he said that he travelled to the United Kingdom following the breakup of his marriage.

36. In the circumstances he will be returning to Jamaica as a 74-year-old suffering with a serious medical condition and with no accommodation waiting for him. I am satisfied that his medical condition makes him unfit to work. I find that that he will immediately experience problems in engaging with required healthcare upon return consequent to his being homeless and attendant difficulties in adjusting to his new life. His problems in engaging in medical treatment in this country when homeless are strong pointers to the problems he will face upon return as he proved incapable in securing required treatment for periods of time. I accept that a further difficulty is that he now presents as confused, consequent to a combination of his advancing years and his prescribed drug regime. I am satisfied that his present mental health concerns further impact upon his ability to care for himself on return to Jamaica.
37. In these circumstances, I am satisfied that he does not have a capacity to participate in social life upon return to Jamaica, nor will he have a reasonable opportunity to operate on a day-to-day basis enabling him to build up such human relationships as to give substance to his private life. I therefore conclude that on the very particular facts arising in this matter the appellant meets the requirements of paragraph 276ADE(1)(vi) and so his appeal should properly be allowed on article 8 grounds.
38. Whilst I have placed no weight upon it in my assessment, I observe the respondent's acceptance in her decision letter that consequent to his medical condition the appellant is not fit to fly. If I had refused the appeal on article 8 grounds, I would have observed that such acceptance combined with the fact that the appellant is fast reaching his twentieth year residing in this country could well provide fertile grounds for another application to remain in the country under paragraph 276ADE(1)(iii) of the Rules.
39. Having found for the appellant under the Rules, there is no requirement that I consider his appeal outside of the Rules and so I do proposed to consider as to whether very compelling circumstances exist.

40. I wish to reiterate my gratitude to Ms. Gilmour for the very careful and considered way in which she advanced the respondent's case before me.

Decision

41. The decision of the First-tier Tribunal promulgated on 20 April 2021 involved the making of a material error on a point of law in respect of article 8 ECHR alone and only on that ground is the decision set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

42. The making of the decision by the First-tier Tribunal did not involve the making of a material error of law on the article 3 ECHR appeal.

43. The decision in respect of the article 8 ECHR appeal is remade by this Tribunal. The appeal is allowed.

44. The anonymity order issued by the First-tier Tribunal is confirmed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 6 June 2022

TO THE RESPONDENT **FEE AWARD**

The appeal has been allowed. The evidence relied upon by the Upper Tribunal in concluded that the appellant met the relevant private life requirement established by the Immigration Rules was before the respondent at date of decision.

Consequently, the respondent is to pay the appellant his fee of £140.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 6 June 2022