Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51671/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 31 March 2015	**On 14 April 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

G H K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Hodgetts, instructed by South West Law
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. On the application of the appellant, which was unopposed by the respondent, I make an anonymity direction under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure in breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

Introduction

2. The appellant is a citizen of Malawi who was born on 30 March 1967. She first arrived in the United Kingdom on 8 July 2003 on a visit visa valid for six months. Her leave was subsequently extended as a student on a number of occasions until 31 August 2009. A further application made on 19 October 2009 for leave to remain as a Tier 4 (General) Student was refused on 26 November 2009. The appellant's appeal was dismissed on 2 February 2010 and a reconsideration was refused by the High Court on 19 February 2010. The appellant became appeal rights exhausted on 3 March 2010.

3. On 18 October 2013 the appellant was informed of her liability to be removed as an overstayer. She made further representations seeking to remain in the UK under Arts 3 and 8 of the ECHR. That application was refused on 15 November 2013 and a decision made to remove her by way of directions under s.10 of the Immigration and Asylum Act 1999.

The Appeal

4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 2 September 2014, Judge Mathews dismissed the appellant's appeal under the Immigration Rules and under Arts 3 and 8 of the ECHR.

5. The appellant sought permission to appeal to the Upper Tribunal. On 9 October 2014 the First-tier Tribunal (Judge E B Grant) granted the appellant permission to appeal.

6. On 17 October 2014, the Secretary of State made a response under rule 24 of the Procedure Rules seeking to uphold the First-tier Tribunal's decision.

7. Thus, the appeal came before me.

The Judge's Decision

8. In dismissing the appellant's appeal under Art 8, the judge considered the appellant's health which was a central feature of her claim. In particular, the appellant had been diagnosed as HIV positive and had other health problems including with her pancreas and, as the judge pointed out, had had "a difficult medical history".

9. The appellant and her sister gave evidence before the judge. The evidence was that the appellant had been diagnosed as HIV positive in 2005 and she had received hospital treatment which had "stabilised" her position (see para 12 of the determination). The evidence was also that she was emotionally supported by her sister and had a close relationship with a Mr F (although the judge considered this relationship was of "very good friends" rather than "long-term partners").

10. As regards the appellant's treatment, the judge recognised that the drug used to treat her pancreatic condition and one of her antiviral drugs were not available in Malawi At para 19, he went on to state:

> "I do note though that HIV treatment is available there, though I find that it may be less effective for this lady than the treatment she is presently receiving in the UK."

11. At para 34 the judge noted that:

> "A decision to remove her from the United Kingdom will separate her from her current medical treatment. The particular implication is that she is likely to be unable to receive the medication presently prescribed, and that will cause her health to deteriorate."

12. At para 35, the judge concluded:

> "That finding must though set against the context of the fact that such a disparity in health care provisions between the UK and Malawi, is outweighed by the public interest in the UK in preserving health care facilities for those intended to benefit from them."

13. Then at para 37 the judge made this important finding:

> "I find that the appellant is presently in stable health and that she has skills that will allow her to generate income should she so wish, she also has a sister in the UK capable of providing financial support to ease the transition to life back in Malawi. I also accept that in Malawi, life as an HIV sufferer will be difficult but the objective evidence showing availability of medical assistance is clear, she can seek and will receive assistance."

14. At para 40, the judge again noted that the appellant:

> "is at present stable and the UK is not to be obliged to undertake her continued health care."

15. In the light of those findings, the judge concluded that the appellant had failed to establish both a breach of Art 3 and Art 8 of the ECHR.

The Issues

16. Mr Hodgetts, who represented the appellant, submitted a detailed skeleton argument based upon a number of grounds some of which he recognised were not raised in the appellant's own handwritten grounds of appeal and would require permission.

17. However, ground 1 did not fall into that category. It was the ground upon which Judge E B Grant granted permission. Essentially, that ground amounts to this. The judge's finding that the appellant's condition was "stable" was based upon a mistake of fact which amounted to an error of law.

18. The basis for that mistake of fact is set out in medical evidence contained in the appellant's bundle which, although it postdates the hearing, is relevant to the error of law and I admit it in accordance with the

appellant's application (not opposed) under rule 15(2A) of the Procedure Rules.

19. Mr Hodgetts referred me to the report of Dr Venkatesan, a Consultant Physician in Infectious Diseases at Nottingham University Hospital dated 6 January 2015 (pages 5-10 of the bundle). That evidence shows that on the day of the hearing, namely 15 August 2014, the appellant's health deteriorated dramatically such that she was admitted to hospital on that date. As I understand it, apart from one occasion when the appellant left hospital to "sign on", after which she had to return because she became extremely unwell including vomiting, the appellant has remained in hospital ever since. The medical evidence is that her HIV condition has dramatically deteriorated. Further correspondence from Dr Venkatesan dated 5 December 2014 (at pages 41-42 of the bundle) certifies that the appellant is unwell and unfit to travel to a hearing centre at Stoke-on-Trent or in Newport. The evidence shows that on the date of the hearing the appellant suffered a DVT (deep vein thrombosis). Mr Hodgetts also relied upon the evidence from the appellant's sister that the appellant was actually feeling unwell at the time of the hearing.

20. Mr Hodgetts relied upon the Court of Appeal's decisions in E & R v SSHD [2004] EWCA Civ 49 and Ladd v Marshall [1954] 1 WLR 1489. He submitted that this medical evidence established that the judge had proceeded on a mistaken basis of fact, namely that the appellant's condition was "stable" when it was not. He submitted that the appellant met the requirements for admitting such evidence under Ladd v Marshall principles: the evidence could not with reasonable diligence have been obtained prior to the hearing; it would probably have an important influence on the result as her medical condition was central to her Art 8 and indeed her Art 3 claim; and that evidence was credible.

21. On behalf of the respondent, Mr Richards submitted that the judge had made a perfectly sustainable finding on the evidence before him. There was no evidence that the appellant had complained to the judge on the day of the hearing that she was unwell. His finding that her condition was "stable" did not exclude the possibility of a sudden subsequent deterioration in her condition. Mr Richards submitted that the judge's finding was, as a consequence, sound, and the appellant's remedy lay outside of these proceedings by making fresh representations.

Discussion

22. In E & R at [91] the Court of Appeal summarised the relevant principles as follows:

> ".....
>
> (ii) .... an appeal may be made on the basis of unfairness resulting from 'misunderstanding or ignorance of an established and relevant fact' ...;

(iii) The admission of new evidence on such an appeal is subject to *Ladd v Marshall* principles, which may be departed from in exceptional circumstances where the interests of justice require."

23. The Ladd v Marshall principles may be summarised (*per* Denning LJ at page 1491) as follows:

"(1) The new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);

(2) The new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive);

(3) The new evidence was apparently credible although it need not be incontrovertible."

24. In my judgment, the evidence relied upon by Mr Hodgetts set out in the appellant's bundle – some of which I have explicitly referred to and summarised above – does demonstrate that in assessing the appellant's medical condition the judge did proceed on the basis of a "mistake of fact". The evidence of the appellant's sudden deterioration on the day of the hearing, when the evidence also shows that she was feeling unwell at the hearing, is wholly inconsistent with the judge's finding that her condition was "stable" at the time of the hearing. It clearly was not. This is not a case where the evidence merely shows a change of circumstances after the hearing which would not fall within E & R. Rather, the immediacy of the "deterioration" following the hearing reflects inexorably upon the appellant's health at the time of the hearing itself. Although there was no fault on the part of the judge in reaching the finding he did on the evidence that was before him, E & R demonstrates that nevertheless proceedings may be unfair and involve an error of law where evidence admitted in accordance with Ladd v Marshall principles demonstrates a factual mistake by the judge.

25. Here, I am satisfied that the evidence relied upon does satisfy the Ladd v Marshall principles. First, clearly this evidence could not with reasonable diligence have been obtained before the hearing. It relates to evidence of the appellant's medical condition immediately following the hearing. Secondly, this evidence wholly undermines the judge's factual finding that her HIV condition and her health generally was "stable" at the time of the hearing. That finding was, in my judgment, material to the judge's adverse finding under Art 8 and, quite possibly, in relation to Art 3. Certainly, Mr Hodgetts' submission that the evidence showing that the appellant cannot leave hospital raises at least the possibility that to remove her in these circumstances would amount to inhuman and degrading treatment. Thirdly, the medical evidence is undoubtedly credible and reliable. Indeed, the contrary was not suggested before me.

26. At the conclusion of the representatives' submissions on the E & R point, I enquired what the respondent's position was if this ground was made out. Mr Richards candidly accepted that if the ground made out then the judge's decision could not stand and the appropriate course was for the appeal to be reheard *de novo* with no preserved findings.

27. In the light of that, it is not necessary for me to consider any of the other grounds raised in Mr Hodgetts' skeleton argument and upon which I did not hear oral submissions from the representatives. The error of law I have identified was material to the Judge's decision which cannot, as a consequence, stand.

Decision and Disposal

28. For the reasons I have given, the First-tier Tribunal's decision to dismiss the appellant's appeal under Arts 3 and 8 of the ECHR involved the making of an error of law, namely a mistake of fact amounting to an error of law. The decision cannot stand and is set aside.

29. Having regard to the factual issues and new evidence concerning the appellant's health, applying para 7.2 of the Senior President's Practice Statements and the nature of the error of law (see, e.g, MM (Unfairness; E & R) Sudan [2014] UKUT 00105 (IAC) at [26] *per* McCloskey J (President)), this is an appropriate case to be remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Mathews.

Signed

A Grubb
Judge of the Upper Tribunal