



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02545/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 August 2018

Determination Promulgated
On 21 August 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

JACK [E]
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Duffy of Counsel instructed by Raj Law Solicitors

For the Respondent: Ms Z Kiss, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Mauritian national born on 25 September 1964. He challenges the decision of First-tier Tribunal Judge Boardman to dismiss his appeal on human rights grounds. It is argued that the judge failed to properly consider the evidence relating to the appellant's health and did not consider the support that he received from his family in the UK when undertaking the article 8 balancing exercise. It is also argued that the judge's finding that the appellant's

ties to the UK were weak was irrational given that he had a wife, children and grandchildren here.

2. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 19 June 2018.
3. The appellant entered the UK as a visitor on 4 April 2015 and on 11 September 2015 he made an article 8 application. This was refused on 1 December 2015. An appeal was lodged but the appellant failed to pay the required fee for the oral hearing he had requested and so listing was delayed until the matter was resolved. The appeal was then listed for 17 May 2017 at Taylor House, but an adjournment was sought by the appellant's representative in order to obtain documents from the respondent. The adjournment was granted and the appeal was re-listed for 18 September 2017. A further application for an adjournment was made on the basis that the appellant had a medical appointment on that date. That hearing was, therefore, also adjourned and re-listed on 12 March 2018.
4. On 9 March 2018 the appellant's representatives notified the Tribunal that the appellant had been convicted for drugs offences in Mauritius in 2006 and had received and served a five-year prison sentence.
5. The respondent was not represented when the matter came before the First-tier Tribunal. The judge heard oral evidence from the appellant in Creole and also from one of his sons who attended the hearing. He later went on to dismiss the appeal in a determination promulgated on 16 March 2018.
6. On 23 March 2018 the appellant prepared a statement which was faxed to the Tribunal with his application for permission to appeal. He acknowledged that he had only mentioned his HIV diagnosis at the hearing but that was because he had felt disturbed and depressed at the hearing. He attached two letters; dated 24 and 25 August 2017 from consultants at Crawley Hospital. The first confirmed he was to start a 12 week course of a tablet a day for chronic hepatitis C and that he had chronic liver disease but no focal aggressive liver lesions. The second confirmed he had first been seen in the sexual health clinic in May 2015, that he was "doing well" from the HIV point of view, that his immunity was good and viral load undetectable.
7. Permission to appeal was granted on 19 June 2018 and the matter was listed for hearing on 3 August 2018.
8. On 13 July 2018 an adjournment was requested to enable Counsel who had represented the appellant at the First-tier Tribunal hearing to attend. The application was refused and the matter then came before me.
9. **The Hearing**
10. I heard submissions from the parties at the hearing before me on 3 August 2018.

Mr Duffy relied on his skeleton argument. He also sought to rely on the hospital letters I have referred to above. He also sought to argue fresh grounds of appeal but as there had been no application to amend the grounds and as Ms Kiss objected to the introduction of new arguments at this stage, I restricted him to the grounds on which permission to appeal had been sought.

11. Mr Duffy argued there were two main issues: the appellant's ill health and the strength of his family ties. The appellant was HIV positive, suffered with Hepatitis C, cirrhosis of the liver and cardiac problems. He had no family in Mauritius but had a wife, children and grandchildren in the UK. It had been accepted by the Tribunal that it would be unreasonable to expect the appellant's wife to leave the UK so removal would break up the family. Mr Duffy relied on EB (Jamaica) [2007] EWCA Civ 1302 for the principle that the impact of the proposed relocation upon a British family member must weigh heavily in the assessment.
12. Although there had been no corroborative evidence before the First-tier Tribunal that the appellant was HIV positive, this had now been submitted and it was important for the appellant's well being that there was continuity of treatment. The appellant had explained why he had not raised the HIV issue before. The Tribunal had perversely concluded that the appellant had weak links with the UK when he was living with his wife, had children and grandchildren in the UK and was receiving ongoing medical treatment for serious health issues. He had no family in Mauritius.
13. Mr Duffy submitted that the judge had failed to take account of the appellant's son's evidence that he would not be able to visit his father in Mauritius.
14. Once it was established that there was an interference in family/private life then the burden shifted to the Secretary of State. In all the circumstances, removal was disproportionate.
15. Ms Kiss responded. She pointed out that the appellant's situation was precarious as he had come here as a visitor. He concealed his conviction and five-year prison sentence when making his article 8 application (at A10 and A13) and only revealed this just before the hearing. Such a person could hardly be said to be of good character. Within weeks of his arrival he had started to receive medical treatment. Reliance was placed on JA (Ivory Coast) [2009] EWCA Civ 1353; the UK could not be the hospital for the world.
16. It had been conceded that article 3 and the requirements of 275ADE were not met and also that there was no Kugathas style family life between the appellant and his children and grandchildren.
17. Ms Kiss also referred to MM Zimbabwe [2012] EWCA Civ 279 and argued that the claim could not succeed on health grounds. The appellant was aware of his heart condition before his arrival. The medical information did not suggest any

urgency in treatment. Six monthly tests were recommended for the liver and there was intermittent treatment for his heart.

18. AM (Zimbabwe) [2018] EWCA Civ 64 clarified the situation for health cases. Intense suffering was required. Article 8 was not an alternative to the higher standard of article 3; there had to be more. Whilst the appellant had received support in the three years he had been here, this had to be considered in the context of his history. His wife and children had come here in 2005. They did not see each other again until 2015 even though his wife made two trips to Mauritius. Only one of four children had provided a witness statement. His son said he could not visit. This did not suggest strong ties. The appellant had been over 50 when he came to the UK; it was not arguable that he would not have strong ties to Mauritius in those circumstances. Not only was his status precarious but he was a foreign offender and article 8 had to be considered in that prism.
19. In reply, Mr Duffy submitted that the appellant had established his family life with his wife long before he came here. They had married in 2005 but had had children since the 1990s. The adverse weight to be attached to his conviction was outweighed by family and private life matters. The judge had accepted that article 8 was engaged. There was no finding by the Tribunal that the appellant had exaggerated his health conditions. There was 'more' to engage article 8 (as per MM); the appellant had support from his family. He did not have the same medical issues prior to arrival so did not need support then. The respondent had not discharged the burden of demonstrating that removal was proportionate.
20. Brief submissions were made by both sides on the newly submitted material and I then reserved my determination which I now give with reasons.
21. **Discussion and Conclusions**
22. I have considered the submissions, the evidence and the determination of the First-tier Tribunal Judge with care.
23. Permission was granted on the two grounds put forward: (1) the lack of weight given to the appellant's health conditions and the lack of family support in Mauritius as compared to the support received here; and (2) the irrationality of the judge's findings regarding his ties to both the UK and Mauritius. Both are, however, part of the same complaint – that the proportionality assessment had not been properly undertaken.
24. The judge was required to consider whether the appellant qualified to remain on article 8 grounds, it having been accepted that the article 3 threshold had not been met and that he could not succeed under the rules on suitability grounds because of his criminal conviction. It was also conceded that there was no family life claim based on the children and grandchildren but that they formed part of

his private life as did the treatment he was receiving from the NHS. I now consider the two limbs of the appellant's challenge.

25. I would state at the outset that the documentary evidence adduced is sparse and that minimal information has been provided. This despite the appellant having had an extra year, due to the many adjournments, to prepare for his hearing. His appeals bundle contained little new or helpful information; it was mostly made up of documents already in the respondent's bundle.
26. There is no evidence at all of the nature of support provided to the appellant, if such is provided, by his wife or other family members. There is no information on what support the appellant requires or what assistance he needs in everyday chores and activities. There is no information as to any personal care needs. The medical documents make no reference to any care and/or support being necessary. Nor does it suggest that an absence of support would impact in any way on his health conditions. Indeed, the evidence is silent on the issue of support other than an unparticularized claim that it is needed. In these circumstances, and given the absence of any information and the lack of evidence, it is difficult to see how the complaint that the judge did not consider the lack of support in Mauritius or its impact upon the appellant's health, can be upheld.
27. There is also limited evidence of the appellant's health conditions. He admits to having had cardiac problems prior to his arrival and to being told nothing more could be done for him, but the nature of the problem is not explained. The cardiology procedure he was to be admitted for in September 2017 (for which an adjournment was granted) is not explained nor is there evidence it was carried out. The next appointment (as an outpatient) has been listed for a year later (in September 2018). No details are provided. Nor are there any GP notes that would have been a simple matter to obtain. The appellant is also silent on how his illness affected him in Mauritius and how he was able to manage there without his family.
28. The appellant also claims to suffer from Hepatitis C and chronic liver disease however the medical evidence on that is a year old. He was treated with a tablet a day for 12 weeks back in August 2017 and required follow ups for six months thereafter, but both those time periods have passed and there is nothing to suggest he still requires any treatment for either of those conditions.
29. That leaves his HIV diagnosis. The appellant did not make any reference to this condition until the hearing. Nor did he submit any documentary evidence of it for the judge to consider. His explanation, which was forwarded after the determination was promulgated, was that he felt upset and disturbed on the day of the hearing but that does not explain why he chose not to provide details of his condition and evidence in the lengthy run up to the hearing. It was therefore open to the judge to conclude as he did on the matter. In the absence

of any evidence it is difficult to see how it can be an error not to place weight on it.

30. I have, nevertheless, considered the further two documents submitted. They are, as stated earlier, a year old. Only one addresses the HIV issue. Interestingly, it notes that the appellant was first seen in May 2015 which suggests that the appellant was aware of his ill health before he came to the UK for his alleged visit in April 2015. It also maintains that the appellant's immunity is good, viral load undetectable and that he is tolerating his medication well. There is no suggestion that his treatment would be unavailable in Mauritius or that he would be unfit to travel back or that he needs support and care from family.
31. I cannot, therefore, find that the judge made any errors in his approach to the appellant's medical conditions or the lack of family support in Mauritius.
32. The second complaint which is that the judge reached irrational findings about the appellant's ties to the UK and to Mauritius. The appellant's grounds are, however, selective in what they rely on whereas the judge considered all the evidence as a whole. Whilst it is correct that the appellant lives here with his wife, it is also the case that he lived apart from her for the ten years between 2005 when they married and she left the country with the children, and 2015 when he came to the UK. No reasons have been given for her departure or for why the appellant did not come and visit his wife and children earlier. There is no explanation for why his application for entry clearance in 2011 was withdrawn. There is no explanation for why his wife did not see him when she visited Mauritius on two occasions during that period or why she did not prepare a supporting statement for his appeal. There is no information on how often he sees his children and grandchildren or what other contact they have. Only one son prepared a statement and attended the hearing but his evidence is also lacking in detail. It is not properly explained why his son would be unable to visit him in Mauritius. There is no suggestion that he is in financial difficulties which would make it impossible for him to ever be able to afford the air fare. All these matters undermine the appellant's claim that he has strong family ties. The judge also had regard to the fact that the appellant had remained in Mauritius without his wife and children, that he did not travel with them, that he had supported himself and that in the five decades he lived there he must have built up strong ties. In the context of all these facts and the background, the judge's findings were not perverse. He properly found that it would be unreasonable for the appellant's wife to leave the UK but he was also entitled to observe that it was for her to decide whether to return with him to Mauritius or to remain and conduct her married life as she did for the ten years before the appellant came here.
33. I have considered the case law relied upon in reaching my decision. The court confirmed in AM (Zimbabwe) that to succeed in health cases there needed to be a serious and rapid decline in health resulting in intense suffering to the article 3 standard – the Paposhvili test (at 40). No such evidence has been adduced in

this case and indeed it was conceded that the article 3 threshold could not be met. Mr Duffy relied on MM (Zimbabwe) and argued that the appellant had established a strong case and that the support of his family here is what brought his case under the terms envisaged at paragraph 23. The judge, found, however that the appellant's ties were not strong (or firm, in MM language) and I have already addressed the issue of family support.

34. The judge was required to balance all the factors for the appellant against the public interest in his removal. As someone who does not meet the requirements of the Immigration Rules, who did not leave after his visit, who apparently appeared to know of his health condition prior to coming here (possibly even prompting his journey), who promptly sought medical treatment under the NHS after his arrival and made ongoing use of its limited resources and overstretched facilities at the expense of the taxpayer, whose situation has always been precarious, who concealed his criminal conviction from the authorities until just before his appeal hearing for reasons which were rejected, who has provided no evidence of his claimed inability to access treatment in Mauritius, who does not speak English and has shown no financial independence, the public interest in his removal is strong. It was open to the judge to give it more weight than the appellant's article 8 claim. The judge gave ample and adequate reasons for his decision. No error of law has been established.
35. **Decision**
36. The First-tier Tribunal did not make any material error of law which necessitates the setting aside of the decision. The decision to dismiss the appeal stands.
37. **Anonymity**
38. I was not asked to make an anonymity order and, in any event, see no reason to do so.

Signed



Upper Tribunal Judge

Date: 9 August 2018