



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/04388/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 11 June 2018

Decision & Reasons Promulgated  
On 22 June 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS FAITH CHIPO HAKATA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant/Secretary of State: Mr S Kotas, Home Office Presenting Officer  
For the Respondent: Mr Richard Bartram, Richard Bartram Solicitors

DECISION AND REASONS

1. The Appellant is a citizen of Zimbabwe. Her date of birth is 11 November 1981. She came here as a visitor on 27 August 2002. She is an overstayer. She made an application for asylum in 2009 which was refused. She made an application on human rights grounds in 2011. This application was refused. She appealed and her appeal was unsuccessful. On 1 August 2015 she applied for leave to remain on the basis of her relationship with her husband Richard Baxter, a British citizen. Her application was refused by the Secretary of State in a decision of 8 February 2016. She appealed against this decision. Her appeal was allowed by First-tier Tribunal Judge I Ross in a decision which was promulgated on 2 August 2017, following a hearing at Taylor House on 18 July 2017.

2. Permission was granted to the Secretary of State by Upper Tribunal Judge Gill on 24 April 2018. The matter came before me to determine whether or not Judge Ross had made an error of law.

### **The Decision of the First-tier Tribunal**

3. The First-tier Tribunal heard evidence from the Appellant, Mr Baxter, the Appellant's two aunts (Hazel Stonya and Helga Hakata), Mr Baxter's mother (Elizabeth Evans) brother (James Baxter). The judge had before him a significant quantity of medical evidence about which he said as follows:-

“19. Contained in the bundle submitted by the appellant were letters from doctors at King's College Hospital which confirmed that the appellant suffers from something called refractory epilepsy. His symptoms have got worse since 2013. His wife is his main carer and plays a crucial role in looking after him on a daily basis and ensuring that he is safe at night. His seizures get worse if he is stressed when the weather is hot. His epilepsy is difficult to control. These sentiments are echoed by the consultant neuro surgeon and neurologist. Members of the family and friends have written letters in support of the appeal emphasising the closeness of the relationship between the appellant and her husband. Also contained in the bundle were a number of reports relating to the availability of medicines in Zimbabwe”.

4. The judge had before him a copy of the decision of Judge Glossop who dismissed the Appellant's asylum appeal in 2012. He recorded that Judge Glossop concluded that the Appellant could, as an accomplished English speaker, obtain employment in Zimbabwe. He rejected her claim for asylum because she did not have a well-founded fear of persecution and would not suffer serious harm. Judge Glossop dismissed the suggestion that the Appellant's husband could not go with her to Zimbabwe and that medication was not available to him there. Judge Glossop rejected the Appellant's claim to have a genuine family life in the UK with Mr Baxter and agreed with the Secretary of State that she had married to try to prolong her stay in the UK.

5. The salient findings of Judge Ross are as follows:-

“21. Although the starting point in this case must be the decision of the earlier judge. I now have more evidence than he had about the nature of the relationship between the appellant and her husband. There are very many letters in support which confirmed the genuineness of the relationship. I also accept the evidence of his brother and mother who clearly view the relationship as not only genuine but essential to Mr Baxter's welfare. In addition it is now five years since the decision of Judge Glossop, and the parties are still together. The focus of the earlier case was the asylum claim, whereas I am now only dealing with the article 8 case, and have heard very much more evidence than the earlier judge about the relationship. The

wider family are unanimous in their support for the appellant who they obviously regard as a devoted and loving wife. In addition the respondent now accepts in the refusal letter that the relationship between the appellant and Mr Baxter is genuine and subsisting. I therefore have no hesitation in finding that the relationship is genuine and subsisting, despite the earlier decision of the tribunal.

25. As I have already indicated, I accept that the relationship is a genuine one and that the marriage is subsisting, and the parties intend to live together permanently in the UK. The appellant's partner is in receipt of disability living allowance. Unfortunately although she does speak good English she doesn't come from one of the countries set out in paragraphs 2.to of appendix KOLL.
26. It follows that the appellant does not meet the eligibility requirements, and must rely on the exceptions in EX1. The provisions of EX1 (b) apply if the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen settled in the UK or in the UK with refugee leave or humanitarian protection and there are insurmountable obstacles to family life with that partner continuing outside the UK. The term insurmountable obstacles is defined in EX2 as very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.
27. I consider that the applicant has a genuine and subsisting relationship with her partner on the facts of this case I consider that there are very significant difficulties which would be faced by the appellant and her partner in continuing their family life in Zimbabwe, and that these difficulties could not be overcome or would entail very serious hardship for the appellant or her partner. The evidence that I have heard is that Mr Baxter's epileptic fits will become worse if he is stressed, or if the weather becomes hot or humid. I consider that it is very likely that he would become stressed if he was obliged to move to Zimbabwe, particularly since they would have no means of supporting themselves except from the earnings of the appellant herself. If she was working she would not be able to look after Mr Baxter. This argument is amply supported by the evidence of the family, and the doctors. The further argument that the medical care which the appellant receives would not be available in Zimbabwe is perhaps less clear. The documents which were produced at page 32 onwards in the bundle indicate that there is a shortage of epilepsy drugs in Zimbabwe, and one report estimates that 86% of people with epilepsy in Zimbabwe are not receiving medication. Looking at the material which has been produced, it would seem that his care in Zimbabwe will certainly be much worse than in UK, and there may be problems obtaining the requisite medicines. For all these reasons I consider that the appellant and her wife will face very serious

hardship if they were obliged to resettle in Zimbabwe. I therefore consider that the appellant does comply with the rules.

30. I have to consider the five step approach set out in the case of **Razgar v SSHD 2004 UKHL 27**. Firstly I must consider whether the proposed removal would amount to an interference by a public authority with the appellant's family life. For the reasons that I have already given, I do not consider that it is reasonable to expect Mr Baxter to accompany his wife to Zimbabwe. Indeed he has indicated that he would not be prepared to do this because of the risks to his health. Accordingly I consider that the decision does interfere with family life because it splits up the family. I have to consider both the appellant's family life and also Mr Baxters. I also consider that the decision interferes with the appellant's private life, having regard to the links which she has clearly established in the UK with family and friends. However this interference is secondary to the interference with her family life.
31. Looking at the second, third, and fourth stages, I consider that the interference does potentially engage the convention, that it is lawful, and necessary subject to the issue of proportionality.
32. The crucial issue in this case is whether the decision is proportionate. In this case I have found that the appellant does meet the requirements of the immigration rules. In the same way that it is in the public interest to exclude people who did not meet the immigration rules so that effective immigration controls can be maintained, there can be little public interest in excluding someone who does meet the immigration rules. I consider that the fact that she meets the immigration rules is a very heavy factor which I have to weigh in her favour. In essence the decision forces on the parties a permanent separation.
33. On the other hand I take into account the poor immigration record of the appellant. She has remained in the UK despite the fact that her visa expired at the beginning of 2003. She has lived illegally in the country for the last 14 years. I must also take into account **section 117B Nationality Immigration and Asylum Act 2002** this states that I must consider the public interest, and maintenance of effective immigration controls is in the public interest. This section goes on to state that it is in the public interest that persons who seek to remain in the UK are able to speak English. Having heard the appellant give her evidence it is clear that she does speak English, even though she has not passed the test. The section continues that it is in the public interest that persons who seek to enter or remain in the UK are financially independent. I do not consider that this paragraph is applicable in this case because the appellant's partner is disabled and claims the appropriate living allowance. More significantly the section states that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the

UK illegally. It is clear that the relationship in this case was formed after the appellant's visa had expired.

34. Weighing up all the factors in this case and applying the balance sheet approach as recommended in the case of **Heshem Ali 2016 UK SC 60**, I conclude that the respondent has failed to prove on the balance of probabilities that the decision was proportionate. As I have indicated I bear in mind all the factors which can be relied on by the respondent, but I consider that the particular circumstances of this case, and the fact that the appellant does comply with the immigration rules clearly show that the impact on Mr Baxter would not be proportionate, and that the decision would be a disproportionate interference with his human rights, and also those of his wife the appellant. For these reasons I allow the human rights appeal”.

6. The judge allowed the appeal under Appendix FM having found insurmountable obstacles to family life continuing in Zimbabwe. He considered the appeal outside the Immigration Rules concluding that the decision was not a proportionate interference with the Appellant's rights under Article 8.

### **The Grounds of Appeal**

7. The first ground asserts that the judge materially erred in respect of insurmountable obstacles. The test applied by the judge was not sufficiently stringent. It is a more demanding test than one of reasonableness. The judge did not properly take account of the finding of Judge Glossop that medication was available for Mr Baxter’s condition in Zimbabwe. He may not receive the same level of care he presently enjoys here; however, that did not amount to insurmountable obstacles. The judge failed to give reasons for his decision and failed to identify insurmountable obstacles.

8. The second ground argues that the judge failed to apply the judgement in *Agyarko* [2017] UKSC 11. He failed to accord appropriate weight to the Appellant's immigration history and precarious family life.

9. I heard oral submissions from the representatives.

### **Conclusions**

9. EX.2. of Appendix FM defines insurmountable obstacles as follows:-

“For the purposes of paragraph EX.1.(b) ‘insurmountable obstacles’ means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner”.

10. The judge accepted the evidence of the witnesses and attached significant weight to their evidence. He made findings of fact favourable to the Appellant which are unchallenged. The evidence, as accepted by the judge, was that the Appellant was her husband's full-time carer, he has epilepsy, he suffers from frequent epileptic fits exacerbated by stress, he is unable to work, the Appellant is unable to work when caring for him, she protects him from injuring himself whilst having a fit and she creates a calming, stress-free environment for him. The medical evidence, as set out by the judge at paragraph 19, from doctors at King's College Hospital, was that the Appellant is her husband's main carer and plays a crucial role in looking after him daily and ensuring that he is safe at night. The judge stated that this evidence was echoed by a consultant neurosurgeon and neurologist. The medical evidence supported the evidence of the witnesses.
11. The judge had before him the decision of Judge Glossop who dismissed the Appellant's asylum appeal on 17 October 2012, having concluded that there was medication available to the Appellant's husband in Zimbabwe. He did not accept that there was family life between the Appellant and her husband. There was considerably more evidence before Judge Ross in respect of the Appellant's family life and Mr Baxter's health condition. Judge Ross found no hesitation in finding that the relationship was genuine and subsisting in the light of the evidence available to him that was not before Judge Glossop. There is no cogent challenge to this finding. There is no properly articulated challenge on *Devaseelan* grounds (*Devaseelan* [2002] UKIAT 702). Judge Ross did not find that medication would not be available and did not depart from the findings of Judge Glossop on this issue. In respect of medical care generally, Judge Ross did not proceed on the basis that it would not be available. He found that it would be worse in Zimbabwe; however, this was not determinative of the issue of insurmountable obstacles.
12. The judge considered the impact of Mr Baxter's disability on family life in Zimbabwe. He accepted that his epileptic fits would worsen if he became stressed. He found that it was likely that he would become stressed, which he found to be supported by doctors and family members. The evidence was that Mr Baxter was dependent on the Appellant's care; his condition would deteriorate if he was to return with the Appellant to Zimbabwe. He found that they would have no income if the Appellant was to care for her husband and if she worked she would not be able to care for him. It was not challenged that he was not able to work because of his health condition. A proper reading of the decision makes it clear that these can be properly identified as the factors that the judge viewed as cumulatively amounting to insurmountable obstacles because they would result in the Appellant and her husband having to face very serious hardship.
13. The grounds are misconceived because a lack of available medical care was not determinative of the issue of insurmountable obstacles. The judge heard extensive evidence. He accepted what the witnesses said about the relationship, Mr Baxter's health and what would happen on return. There was a quantity of medical evidence to support that Mr Baxter's health would deteriorate on return to Zimbabwe. Whilst the Appellant has family in Zimbabwe (grandparents and siblings), there was no

suggestion that they would be able to care for Mr Baxter so that the Appellant could work or that the Appellant and Mr Baxter could rely on them so that she could carry on caring for him whilst in Zimbabwe.

14. The judge properly directed himself and applied the test of insurmountable obstacles in accordance with the definition at EX.2 which he set out at paragraph 26 of his decision. In respect of the definition of insurmountable obstacles the Supreme Court found in *Agyarko* (see paragraphs 44 and 45) that the expression was intended to bear the same meaning in the Rules as set out in Strasbourg case law from which it was derived and it should be interpreted as bearing the same meaning as now set out in paragraph EX.2. There is no error of law arising from the decision of the judge that the requirements of the Rules are met.
15. It was not necessary for the judge to go on and consider whether there were exceptional circumstances to allow the appeal outside of the Rules because he found that the Appellant met the requirements of the Rules which represent the Secretary of State's expression of where the balance should be struck between the public interest and individual rights. It cannot sensibly be argued in this case that the decision is not proportionate in the light of the lawful and sustainable decision that the Appellant meets the Rules.
16. The Secretary of State's application is refused. The decision of Judge Ross to allow the appeal under Article 8 is maintained.

No anonymity direction is made.

Signed *Joanna McWilliam*  
Upper Tribunal Judge McWilliam

Date 21 June 2017