Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35078/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 20th February 2018	**On 21st March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

C M
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Byrne, Advocate, instructed by Drummond Miller, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Handley dismissing an appeal under Article 8 of the Human Rights Convention.

2. The appellant is forty-five years old and is a national of Zimbabwe. She entered the UK in 2002 as a visitor. She had leave to remain as a student between 2003 and 2006. In 2009

she claimed asylum unsuccessfully. In December 2014 she applied for leave to remain on the grounds of private and family life. This application was considered under paragraph 353 of the Immigration Rules. Its refusal gave rise to the present appeal.

3. The appellant suffers from two serious and chronic medical conditions, Primary Sclerosing Cholangitis (PSC) and Systemic Lupus Erythematosis (SLE). As a consequence of PSC she was in 2012 put on the waiting list for a liver transplant. Her condition stabilised and she was taken off the waiting list in 2014. The medical expectation for her condition is that her liver may fail some time in the future and, if so, her survival will depend upon having a liver transplant.

4. The appellant's mother and brother reside in the UK. The appellant lives in the same household as her cousin and her cousin's wife and child, who was aged five at the time of the hearing before the First-tier Tribunal. The appellant helps with housework, cooking, shopping and childcare for her cousin and his wife. She is supported by her family members.

5. The judge found that the appellant's dependency on family members in the UK did not extend beyond normal emotional ties. This finding was challenged in the application for permission to appeal. It was contended that the judge did not take into account evidence that the stability in the appellant's medical condition was achieved with the support of her family. Alternatively, if the judge had taken this into account, the judge gave no rational reason why dependency did not extend beyond normal emotional ties. The Judge of the First-tier Tribunal found that the appellant's health did not engage Article 8. It was contended that this was a further error. The appellant's medical conditions constituted an interference with her physical and moral integrity. Her health was a factor which should have been taken into account in assessing proportionality.

6. Permission to appeal was granted by the Upper Tribunal because it was arguable the judge failed to have regard to the totality of the evidence and, in particular, the assertion that the appellant had achieved stability because of the support of her family members in the UK.

Submissions

7. At the hearing before me, Mr Byrne, for the appellant, argued that the Judge of the First-tier Tribunal erred in finding that the appellant did not have family life in the UK and by failing to

recognise that her health conditions were relevant to Article 8. Mr Byrne relied, in particular, on *MM (Zimbabwe)* [2012] EWCA Civ 279 and *Akhalu* [2013] UKUT 400. The appellant had been in the UK for 15 years by the time of the hearing before the First-tier Tribunal. For much of this time she had been here lawfully, though she had periods of overstaying, and she had made an asylum claim. There were significant health issues, which the Judge of the First-tier Tribunal left out of account when considering dependency. In relation to dependency the judge had not carried out an adequate analysis of the appellant's physical and emotional dependency arising from her ill health. The judge did not have regard to the appellant's vulnerability. The judge went on to make a further error by finding Article 8 was not engaged on the grounds of health. The appellant's medical condition changed the complexion of her Article 8 claim. It was wrong of the judge to consider the appellant's health on its own as a principal ground under Article 8. The appellant's health should have been included on a holistic basis in consideration under Article 8.

8. For the respondent Mr Matthews drew attention to the submissions made before the First-tier Tribunal in relation to the appellant's health. The appellant's medical condition was serious but the most recent medical evidence before the First-tier Tribunal was mainly from 2012 and 2013. When considering family life, at paragraph 26 of the decision, the judge took into account the appellant's health and found as a matter of fact that the appellant did not have family life in the UK.

9. Turning to the significance of the appellant's health to Article 8, Mr Matthews referred to *MM(Zimbabwe)* and *GS India* [2012] UKUT 397. It was recognised in *MM (Zimbabwe)* that there was a possibility that medical treatment might be relevant to proportionality but only where Article 8 was engaged. The judge found that Article 8 was not engaged by the appellant's health. This case was not exceptional. The right to private life was not be engaged in this appeal in the manner envisaged at paragraph 40 of *Akhalu*.

Error of law

10. Having heard the parties' submissions on the question of whether the Judge of the First-tier Tribunal erred in law, I was satisfied that the judge did so err, for the following reasons.

11. At paragraph 40 of the decision the judge found that the appellant's dependency on her family members in the UK did not extend beyond normal emotional ties. The appellant did

not therefore have family life in the UK and Article 8 was not engaged. In assessing dependency the judge stated that he had taken account of the appellant's "...medical condition which is stable". To make no more than a bald assertion that the medical condition had been taken into account is wholly inadequate in the circumstances of this appeal. The judge appears to have barely engaged with the detailed medical evidence and to have made no attempt to analyse its possible impact on the question of dependency. In respect of these matters the judge's reasoning is deficient and this constitutes an error of law.

12. The judge then compounded the error by returning to the issue of the appellant's health at paragraph 29, where the judge found that Article 8 was not engaged on account of the appellant's ill health. The judge observed that in *MM (Zimbabwe)* it was noted that while case law did not say that Article 8 could never be engaged by the health consequences of removal, no breach of Article 8 had ever been found on this basis. In making these observations, however, the judge failed to appreciate that the proper place for taking into account health issues in a case such as this was in examining all the private and family life issues in the round. Having rejected without adequate reasoning the appellant's claim to respect for family life, the judge then side-stepped the issues arising from the appellant's ill health by stating that these would not found a stand alone claim under Article 8. This was, however, beside the point. The judge ought to have carried out a proper analysis when considering whether the factors relating to the appellant's private and family life in their entirety would engage Article 8.

13. I indicated to the parties that the decision of the First-tier Tribunal would be set aside. There were no conflicts in the evidence of primary facts and I proposed to re-make the decision, having heard further submissions from the parties.

Further submissions

14. Mr Byrne requested that the appellant and her family be given the opportunity of a further hearing at which they might give evidence, and for which up-dated medical evidence might be provided. I responded that the hearing before the First-tier Tribunal had already provided an opportunity for these matters to be addressed. The directions issued by the Upper Tribunal set out a presumption that if the decision of the First-tier Tribunal were to be set aside the decision would be re-made at the same hearing. If there had been a significant change in the appellant's medical condition, this might form the basis of

a further claim. I would therefore hear submissions with a view to re-making the decision.

15. In further submissions for the appellant Mr Byrne relied on Article 8. He referred to the medical evidence. He submitted there was dependency by the appellant on her family taking into account her significant health issues. He referred also to the appellant's length of residence. In 2012 the appellant was diagnosed with a life threatening illness. There was a risk of major deterioration. The support the appellant received from family members was set out in her witness statement. The appellant provided support for her cousin and his child and was supported in return during periods of illness. Mr Byrne observed how closely the appellant's case resembled the paradigm case envisaged by Moses LJ at paragraph 23 of *MM (Zimbabwe)*. He referred also to *Akhalu*, at paragraph 40. Looking to the Immigration Rules as a guide, although the appellant did not satisfy paragraph 276ADE, there was the additional factor of her health. Her removal would be a disproportionate interference with her right to private and family life.

16. For the respondent Mr Matthews pointed out that the Secretary of State had considered the case under paragraph 276ADE, as recorded in the reasons for refusal letter. The appellant had been in the UK since 2002 and had briefly returned to Zimbabwe in 2006. She had returned to the UK with leave in September 2006. This was the last occasion on which she had a lawful basis to be in the UK. She had been an overstayer for a decade. In 2009 the appellant was informed she was liable to removal. She then claimed asylum and her appeal against refusal was dismissed in 2009. Further submissions were refused and there was a subsequent judicial review. Another set of further submissions led to the present appeal.

17. Mr Matthews continued by observing that any family life the appellant might have in the UK did not engage Appendix FM of the Immigration Rules. She could still show on the balance of probabilities that she had family life in the UK. Her history prior to 2011 was not indicative of family life. She was not able to show family life at the time of her asylum claim. Prior to 2011 the appellant had already been diagnosed with lupus but she then had a serious medical event. There was no doubt she was given support at that time. This did not necessarily show the existence of family life in the legal context, nor did it show family life continuing forever. Since her ill health in 2011 the appellant has had a significant medical condition with a risk of further deterioration, though in 2014 the appellant had been removed from the liver transplant waiting list. The

appellant was in fairly good health though predicting the future for her was not easy. Her medical condition did not appear to be so severe as to prevent her from working. Letters from the appellant's family showed that she had a desire to work if given leave to remain. Meanwhile the appellant was supported financially by her family. She attempted to repay her family by means other than money. This did not show the existence of family life. Her relationships were part of her private life and a claim based on private life would not succeed because of the authorities cited in the reasons for refusal letter.

18. Mr Matthews referred to the issue of whether removals to Zimbabwe had been enforced at times in recent years. He submitted there was an onus on an individual to leave the UK when told to leave. If the question of delay was to be raised, the appellant should have clean hands. Most of her residence in the UK had been unlawful. There were strong public interest factors to be taken into account. Reliance was placed upon *Agyarko* [2017] UKSC 11 and *Rhappiah* [2016] EWCA Civ 803. There was the possibility of the appellant being financially supported in Zimbabwe by her family in the UK. Her family might even pay for her medical treatment. This was not a case in which an Article 8 claim was made out on medical circumstances.

19. Responding for the appellant Mr Byrne acknowledged the appellant had had a period of overstaying. She had not arrived in the UK with a pre-existing medical condition. Her illness arose when she was already here. Her reluctance to return to Zimbabwe was explicable. In 2013 she was on a waiting list for a transplant which was not available in Zimbabwe. This was different from the position of a healthy person who refused to return.

Discussion

20. In this appeal it is not disputed that the appellant will not succeed either under the Immigration Rules or under Article 3. Under paragraph 276ADE she has neither completed 20 years residence nor is it contended that there are significant obstacles to her integration in Zimbabwe. Her condition does not meet the high threshold for medical cases under Article 3, in terms of *D v UK* (1997) 24 EHRR 423 and *N v SSHD* [2005] UKHL 31.

21. It is instructive to look at the medical evidence, albeit that it dates from 2014 at the latest. The condition which manifested itself first, in 2004, was systemic lupus erythematosus (SLE).

In 2014 this was stable and was kept under control by an immune suppressant drug. Her other condition was primary sclerosing cholangitis (PSC), which is a liver disease involving narrowing and inflammation of the bile ducts. After the symptoms of this condition manifested themselves in 2011 the appellant required prolonged hospitalisation, including a spell in intensive care, and in 2012 she was put on the waiting list for a liver transplant. In 2014 she was removed from the waiting list. By November 2014 her condition was stable but subject to what her consultant physician described as an "ongoing risk of major deterioration in her health in the future on a timescale that cannot be determined." The same consultant previously gave his opinion that a liver transplant was probably the appellant's only long term means of remaining in good health. There was no liver transplant programme in Zimbabwe but there were programmes in South Africa.

22. The starting point for an appeal relying on Article 8 is s 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). This provision states that the maintenance of effective immigration control is in the public interest. It is in the public interest that persons seeking to remain in the UK are financially independent so that they are not a burden on taxpayers and are better able to integrate into society. Little weight should be given to a private life established when a person is in the UK unlawfully or when the person's immigration status is precarious.

23. In *Agyarko* [2017] UKSC 11 the Supreme Court considered a number of issues relating to the question of the correct approach to the application of Article 8 to the removal of a non-settled migrant. Lord Reed gave judgment on behalf of the Court. At paragraph 57 he considered the approach which was appropriate when a court or tribunal was considering whether a refusal of leave to remain was compatible with Article 8 in the context of precarious family life and observed:

> "Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of state' policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question…The

> critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

24. Shortly thereafter, at paragraph 60, Lord Reed stated:

> "It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test…The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual's case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique"…"

25. In the present appeal the Judge of the First-tier tribunal found the appellant had no family life in the UK, although this conclusion was not supported by adequate reasoning. Some of the factors on which the appellant relies might be regarded in general as constituting private life, rather than family life. In a case like this there may well be a considerable overlap between family and private life. In the authorities on which Mr Byrne relies, notably *MM (Zimbabwe)* and *Akhalu*, reference was made to private life and family life. Of particular significance from *MM (Zimbabwe)* is the view expressed by Moses LJ at paragraph 23, where he stated:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person will be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That

> conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

26. As Moses LJ pointed out in the course of his judgment, this was sufficient to establish private life but the proportionality of removal still had to be assessed. By and large, however, the same factors will be taken into account in assessing the appellant's interests to be balanced against the public interest as are used to establish the existence of private and family life. In the present appeal, unlike in *MM (Zimbabwe)*, there is no offending behaviour to be taken into account on the public interest side of the equation, though the appellant remained in the UK as an overstayer.

27. Of course, the decision in *MM (Zimbabwe)* pre-dates both the decision in *Agyarko* and the insertion of s 117B in the 2002 Act. Under s 117B little weight is to be given to private life established by a person whose status is unlawful or precarious. In such cases, as Lord Reed pointed out, a very strong or compelling claim is required to outweigh the public interest in immigration control. The appellant's claim is not, however, based wholly on private life. She relies on the support of her mother, her cousin and her cousin's wife. She has been helping with the care of her niece since the niece was born. She has firm family ties here and since she became ill the support of her family, together with the medical treatment she has received, have been crucial to her management of her condition and its continuing stability. It should also be noted that the appellant's ill health developed at intervals after her arrival in the UK more than fifteen years ago.

28. These factors constitute a very strong or compelling claim sufficient to outweigh the public interest in immigration control. On this basis the appeal should succeed under Article 8.

Conclusions

29. The making of the decision of the First-tier tribunal involved the making of an error of law.

30. The decision is set aside.

31. I remake the decision by allowing the appeal.

Anonymity

The First-tier Tribunal did not make a direction for anonymity. In view of details of the appellant's medical conditions being disclosed in this decision, I consider it appropriate to make an anonymity direction. Unless or until a court or tribunal directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant or any member of her family. This direction applies to the appellant and to the respondent. Failure to comply with this direction may lead to contempt of court proceedings.

Fee award (N.B. This is not part of the decision)

The appeal is allowed but in view of the complexity of the issues involved I do not consider it appropriate to make a fee award.

Deputy Upper Tribunal Judge Deans 19th March 2018