Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18338/2015

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 3rd September 2019	**On 12th September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS N N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Mariam Cleghorn (Counsel)
For the Respondent: Mr David Mills (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of the First-tier Tribunal, comprising a panel, presided over by Designated Judge McClure, and accompanied by First-tier Tribunal Judge Trent, promulgated on 15th May 2019, following a hearing at Manchester on 7th May 2019. In the determination, the panel dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant, NN, is a citizen of South Africa, and she applied for leave to remain in the UK as a spouse of a person present and settled in the UK. Her application was refused on 28th April 2015. The basis of her claim is that she is HIV positive, and is married to a person known as EN, who originally had refugee status in the UK, as a citizen of Zimbabwe, but now has full British citizenship, and is based in this country. He too, however, is HIV positive. There is evidence that upon entry into the UK in 2004, the Appellant properly registered with the Leicester Royal Infirmary for HIV treatment (paragraph 42). She also takes tablets for high blood pressure, as does her partner, EN. The essence of her claim is that there would be limits on the medication available to her in Africa. She herself is a citizen of South Africa.

The Judges' Findings

3. The panel concluded that the Appellant and her partner were not prevented from enjoying family life either in South Africa or in Zimbabwe. The Appellant herself was born in South Africa and had spent nearly 30 years there. There were no insurmountable obstacles to family life being continued in South Africa (paragraph 65). There were medical facilities available both in South Africa and in Zimbabwe. It may be that medical treatment has to be paid for, but given the income of EN (who earnt in the region of £47,000 per annum (see paragraph 48) such treatment remained accessible to them. They could afford to pay for the drugs in South Africa or in Zimbabwe, "at least while the Appellant is in one such country to make an application for entry to the UK" (paragraph 66).

4. The reason why the Panel took the view that this was simply a matter of the Appellant returning in order to make an application to return back as a spouse of EN, was that EN himself now had settled status in the UK as a British citizen. The Panel accepted that they were both married in 2001 and they had two children, who had been left behind in Zimbabwe with relatives (see paragraphs 59 to 60). Therefore, the view of the Panel was that, "there are no insurmountable obstacles or very significant obstacles to the Appellant returning to South Africa or Zimbabwe and making an application to enter the United Kingdom lawfully" (paragraph 69). Finally, in relation to whether there were "exceptional circumstances" the panel decided that, "we have considered further whether or not there are exceptional circumstances. Having considered all the evidence we find that there are no such exceptional circumstances" (paragraph 75).

5. The appeal was dismissed.

The Grounds of Application

6. The grounds of application states that the panel erred in two respects. First, it conflated the issue of whether there were insurmountable obstacles to family life continuing outside the UK with the issue of whether the Appellant could be expected to return to South Africa and make an application for entry clearance. However, the Respondent Home Office's own policy on "Family Migration: Appendix FM Section

1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes" (Version 4.0, 11th April 2019), made it clear that in cases of "very serious hardship" involving "a serious illness which requires ongoing medical treatment", an application could succeed because this would amount to insurmountable obstacles. Second, in stating that it was open to the Appellant to return back to Zimbabwe to make an application the Tribunal misdirected itself or misapplied the authority of **Chikwamba**, because there was no public interest in requiring the Appellant to do so, in circumstances where the Appellant was otherwise certain to be granted leave to enter.

7. On 22nd July 2019, permission to appeal was granted by the Upper Tribunal on both grounds.

Submissions

8. At the hearing before me on 3rd September 2019, the Appellant was represented by Miss Cleghorn of Counsel and she submitted that the Tribunal had actually failed to take note of what had been said in **Chen [2015] UKUT 189** where the Tribunal found that "there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the United Kingdom where temporary separation to enable an individual to make an application for entry clearance may be disproportionate". She submitted that this was the case here. Both she and EN suffered from HIV/Aids. Secondly, the judge's treatment of "exceptional circumstances" (at paragraph 75) is jejune as it is short and without any accompanying reasons.

9. For his part, Mr Mills submitted that the fact here was that the Appellant's legal representatives had failed to provide clear and irrefutable evidence of difficulties that the Appellant would face in procuring medical treatment in Zimbabwe. In fact, the appeal had been dogged by years of incompetent legal representation. When the Appellant first embarked on her appeal, she was coughing blood. The judge adjourned the matter and gave a direction that there should be a medical report on her condition. She may have had infectious tuberculosis or other illnesses. Despite that direction, the legal representatives failed to comply with what was required of them. This happened yet again the second time, when proceedings had to be adjourned again. On the third occasion the judge proceeded with the hearing, despite non-compliance, only to be corrected on appeal on the basis that he ought really to have adjourned. All that was before the Tribunal panel on this occasion was some newspaper accounts confirming that there would be difficulty in accessing treatment in South Africa, of which the Appellant is a citizen, were she to be returned there. There was no cogent evidence however.

10. The procedural history had so far been overlooked and it may well be that it could have pointed to where the public interest lay. The panel's view was that the Appellant's husband earnt enough money to be able to pay for treatment overseas. Unless that could be successfully challenged, it was a view that was open to the panel. There would be no insurmountable obstacles. It is true that there was delay in this appeal and that too could point to where the public interest lay, because it had been accepted as long ago as **EB (Kosovo)** that a long period of delay has an impact

on the public interest in removal of a person who in normal circumstances should be removed, but who due to the passage of time has now laid down roots such that he or she should be allowed to remain.

Error of Law

11. I am satisfied that the making of the decision by the panel involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, this is a case where both the Appellant and EN, her partner, are HIV positive. He was a citizen of Zimbabwe, but is now a citizen of the United Kingdom. She is a citizen of South Africa. Given that they are both HIV positive, there is a Home Office policy, which the Grounds of Appeal make reference to, on family migration, which makes it clear that,

> "Independent medical evidence could establish that a physical or mental disability, or serious illness which requires ongoing medical treatment, would lead to a very serious hardship: for example, due to the lack of adequate healthcare in the country where the family would be required to live. As such, in the absence of a third country alternative, it could amount to insurmountable obstacles to family life continuing overseas."

12. The panel does not address this Home Office policy and its implications for the Appellant. What the panel does do is to address medical treatment for the Appellant in circumstances where she would only temporarily be in South Africa (or Zimbabwe) in order to make an application for entry clearance. However, if the Appellant's claim is that there are insurmountable obstacles to both herself and EN continuing family life in either of these countries, then the issue of temporary residence is irrelevant, and the Home Office policy needs to be properly looked at. This is especially so, given that there was evidence before the panel (which it has not overlooked as evidence) that "the burden of disease in South Africa had led to the demand of healthcare to grow exponentially, leaving the system 'extremely overloaded'", according to the Minister of Health in South Africa, who had said that "this has resulted in very long waiting times in most of the facilities and lowering of quality in others" (see the article by Alex Mitchley, "the public healthcare system is very distressed, but not collapsing – Motsoaledi" (News 24, 5th June 2018)). The matter needed proper consideration because in relation to EN, he is a British citizen, who is already in receipt of HIV medical treatment in the United Kingdom. To require him to forego his entitlement, as a British citizen, to free specialist treatment under the NHS, if it is the case that he would face inferior treatment in South Africa (or Zimbabwe), is a matter which would render the decision disproportionate.

13. Second, it does appear that the panel has misdirected itself in relation to the **Chikwamba** point. This is a case where the couple are lawfully married, and enjoyed a family life both in Zimbabwe (where they have two children) and have been doing so in the United Kingdom. There is no illegality and no public interest in the refusal of leave to the Appellant to remain in this country as her sponsoring husband's wife. Were she to be able to return back to a country in order to make an

application to enter as her spouse, it would appear that she is "otherwise certain to be granted leave to enter" (see **Agyarko** at paragraph 51). The question is whether "there was any sensible reason as to why he will be required to do so" (see **MA (Pakistan) [2009] EWCA Civ 953**). It does not appear that there are any sensible reasons at all for why they should be required to do so, if it is indeed the case that there are "insurmountable obstacles" by virtue of the fact that the Appellant succeeds under the Home Office's own policy in Family Migration: Appendix FM Section 1.0b Family Life, because the Appellant suffers "a serious illness which requires ongoing medical treatment, which would lead to very serious hardship".

14. Third, this is a case where the panel has gone on to consider whether there are "exceptional circumstances". However, although this is addressed in the final paragraph (at paragraph 75), all that is said is that "having considered all of the evidence we find that there are no such exceptional circumstances". This, however, is insufficient reasoning. This is because, as the decision in **Agyarko [2017] UKSC 11** explains, "the European Court's use of the phrase 'exceptional circumstances' in this context was considered by the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192** (at paragraph 56). The Supreme Court goes on to say that,

> "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's policy, expressed in the Rules and 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 the Immigration Rules, only where there are 'insurmountable obstacles' or 'exceptional circumstances' as defined." (Paragraph 57).

15. What is interesting here is that the Supreme Court then provided helpful guidance when it went on to say in **Agyarko** that,

> "The Secretary of State has not imposed a test of exceptionality in the sense that the case should exhibit some highly unusual feature, over and above the application of the test for proportionality. On the contrary, she had defined the word 'exceptional' as already explained, as meaning circumstances in which the refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate." (Paragraph 60).

16. All the evidence suggested, that with the healthcare system in South Africa being "very distressed" that the Appellant would face "unjustifiably harsh consequences" if she were to be required to leave the UK to go back to that country and make an application to re-enter.

Remaking the Decision

17. I have remade the decision on the basis of the evidence before the Tribunal below, the findings made by that Tribunal, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have already set out above.

Notice of Decision

18. The decision of the panel below amounted to an error of law such that it falls to be set aside. I set aside the decision of the panel of the UTJ McClure. I remake the decision under Section 12(2) of TCEA 2007 as follows. This appeal is allowed.

19. An anonymity direction is made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 10th September 2019

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 10th September 2019