Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07681/2019**

THE IMMIGRATION ACTS

Decided Under Rule 34	**Decision & Reasons Promulgated**
On 10 November 2020	**On 12 November 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

EDNALIVA FERNANDES DE OLIVEIRA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Morgan ('the Judge') promulgated on the 24 September 2019 in which he dismissed the appellant's appeal against the respondent's refusal of her application for leave to remain in the UK on human rights grounds.
2. Permission to appeal was granted by another judge of the First-tier Tribunal on 19 March 2020.
3. The Upper Tribunal, pursuant to the published Covid-19 protocol, issued directions indicating a provisional view that it will be appropriate in the circumstances of this case to determine the question of whether the Judge had erred in law in a manner material to the decision on the papers, providing the parties with the opportunity to comment upon this

proposal and to make any further additional submissions they wished the Tribunal to consider.

4. The parties have responded within time.
5. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
6. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
7. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

> 34.—
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> (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
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> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
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> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
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> (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
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> (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
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> (b) consent to withdrawal, pursuant to rule 17;
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> (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
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> (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.

8. It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers. Nothing on the facts, law, or the pleadings makes consideration of the issues on the papers not in accordance with overriding objectives at this stage.

Error of law

9. The Judge notes at [2] that it was conceded by the appellant's representative that the appellant's medical condition was not sufficient to enable her to satisfy the article 3 ECHR threshold, but that the appellant did rely upon very serious obstacles to reintegration on return to Brazil and claimed there were exceptional and compassionate circumstances making the respondent's decision disproportionate.

10. At [4] the Judge notes that both representatives accepted that the appeal would turn on an assessment of the medical evidence before him.
11. At [10] the Judge writes:

> "10. The respondent submitted that the medical evidence provided by the appellant does not enable a finding that the appellant would face very significant obstacles to her integration should she return to Brazil, as per paragraph 276 ADE(1)(vi). The respondent submits that the appellant is a visitor who has overstayed following the expiry of her visit Visa and has benefited from the treatment offered by the national health service. Whilst the treatment in Brazil may not be of such a high standard as that which the appellant received in the United Kingdom nevertheless treatment is available and there was no evidence provided by the appellant that she would face very significant obstacles. I am persuaded by these submissions. The appellant was in her 30s when she entered the United Kingdom. She has now resided in the United Kingdom for over 10 years. She is understandably well integrated into the United Kingdom and has a substantial private life however there was no evidence before me that would enable or justify a finding that she would face very significant obstacles to her integration should return to Brazil. I find for the sake of completeness that in light of the evidence before me that he would not."

12. The Judge thereafter considered the matter outside the Immigration Rules finding the appellant's inability to satisfy the Rules a significant factor weighing against her in the proportionality exercise. The Judge sets out core findings in relation to this element between [14 – 17] in the following terms:

> "14. I have given considerable weight to the public interest question. I note that the maintenance of effective immigration control is in the public interest. In respect of the interests of the economic well-being of the United Kingdom there was no suggestion that the appellant is not financially independent however this is a neutral factor weighed in the balancing exercise.
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> 15. I note that little weight should be given to a private life that is established by person at a time when the person is in the United Kingdom unlawfully. This is a factor that does weigh heavily against the appellant who has remained in the United Kingdom unlawfully for almost the entirety of her stay.
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> 16. I find that although some of the 117 factors do not weigh against the appellant the public policy requirements of immigration control do weigh against appellant in the balancing exercise because the appellant is able to satisfy the private life requirements required of the immigration rules.
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> 17. In summary I find that the appellant does not satisfy the requirements of the long residence and private life paragraphs

of immigration rules. I therefore dismiss the appeal on human rights grounds."

13. The terms of the grant of permission to appeal are as follows:

> "2. The grounds assert that the Judge erred as follows. The Judge failed to apply the correct test under Article 8 outside the Rules. The Judge failed to take into account medical issues in his assessment outside the Rules. The Judge erred in treating the Appellants inability to meet the Rules as a weighty factor against her.
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> 3. Whilst it is possible that the Judge undertook a proportionality assessment in which he or she considered all of the relevant factors, it is at least arguable that his assessment began and finished with the Appellant's ability to meet the Immigration Rules (see in this regard the final paragraph of the decision). This is arguable for of law.
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> 4. Whilst the last ground in particular appears particularly weak, I grant permission for all of the grounds to be argued."

14. The respondent in her reply to directions asserts in response to Ground 1, in which it is claimed the Judge failed to identify and apply a proportionality assessment outside the Rules, the Judge identified the issue of proportionality is as set out in the refusal letter. The Judge noted the acknowledgement by the parties that the appeal would turn on an assessment of the medical evidence which was not found to come close to the Article 3 threshold.
15. It is submitted the Judge considered the relevant authorities when assessing the proportionality and was clearly minded of the requirement to consider the facts of the case and weigh them against the public interest.
16. In relation to Ground 2, the respondent argues that whilst there is no express reconsideration of the medical evidence in the Article 8 assessment it is clear the Judge had regard to it.
17. In relation to Ground 3, asserting the Judge erred in finding that failure to meet the Rules weighed against the appellant, the respondent asserts that no material legal error is made out.
18. The appellant's position is that the Judge failed to apply the relevant test when assessing the proportionality of the decision. The appellant asserts the Judge failed to undertake a balancing exercise in which weight is given to the appellant's private interests and that the Judge's finding flows from an erroneous assessment that the appellant had not met the Rules and the impact on the rights to be attributed to her.
19. The appellant asserts there is no express consideration of the medical evidence in the article 8 assessment which formed part of the appellant's private life which the appellant claims would render her removal disproportionate. The appellant argues that her complex medical history and the need for future surgery could form part of the assessment which the Judge was considering when weighing up the proportionality of the decision.
20. The appellant asserts the Judge erred in finding that because the appellant could not meet the requirements of the Immigration Rules this

will automatically result in that factor being weighed against her as part of the proportionality assessment. The appellant asserts the Judge erred in treating the Rules as the starting and endpoint of the assessment.

21. The Judge noted in the decision the agreement of the advocates that the core issue in the appeal related to the appellant's medical condition. The Judge's finding that the appellant had not established entitlement for leave to remain under the Immigration Rules, as she had not shown she could meet the very significant obstacles test under paragraph 276 ADE(1)(vi), has not been challenged in the application for permission to appeal and does not, in any event, disclose arguable legal error.
22. Outside the Rules, the Judge accepted that the appellant had formed a private life in the United Kingdom and had demonstrated that exclusion would result in consequences of sufficient gravity to engage the operation of article 8. The Judge identified that the issue was the proportionality of the decision. The core findings in relation to that aspect are set out above.
23. The Judge concluded that there was nothing beyond the evidence adduced in support of the insurmountable obstacles argument, or in the appellant's case generally, sufficient to warrant a finding that was any different from that which had been previously reached, i.e. that the appeal must fail.
24. It is not made out that the Judge having considered the medical evidence in relation to the Rules then completely ignored it when considering the proportionality of the decision. Whilst the structure and content of the decision could be improved upon to enable reader to understand the Judges thinking with greater clarity, avoiding the suggestion matters had not been considered properly which forms the basis of this challenge, a careful reading of the evidence, submissions, and decision does not establish that the Judge has made a material error of law.
25. The Judge was entitled to take into account the inability of the appellant to succeed under the Immigration Rules. That has been confirmed in decisions such as Agyarko [2017] UKSC 11 and TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109.
26. The respondent refers to [32] of TZ (Pakistan) in which the Court of Appeal found:

> "32. In the circumstances that an FtT does not need to make an evaluation about surmountable obstacles, the question arises: how does that tribunal or a subsequent tribunal relying on the same facts approach the question of exceptional circumstances outside the Rules? Again, the answer is to be found in *Agyarko* at [47] and [48]. By reference to *Hesham Ali* at [44 to 46], [50] and [53], Lord Reed made it clear that in striking a proportionality balance (i.e. when undertaking an article 8 evaluation outside the Rules) a tribunal must take the Secretary of State's policy into account and attach considerable weight to it 'at a general level'.
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> 33. This means that a tribunal undertaking and evaluation of exceptional circumstances outside the Rules must take into account as a factor the strengths of the public policy in

> immigration control as reflected by the Secretary of State's test within the Rules. The critical issue will generally be whether the strength of the public policy in immigration control in the case before it is outweighed by the strength of the article 8 claim so that there is a positive obligation on the state to permit the applicant to remain in the UK. The framework or approach in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 1 AC 368 at [17] is not to be taken to avoid the need to undertake this critical balance."

27. The Judge found that little weight could be given to the private life formed by the appellant in the United Kingdom pursuant to section 117B of the Immigration Act 2002, as it was a private life that had been formed during the time the appellant's presence in the United Kingdom has been precarious, and since the expiration of her visit Visa, arguably unlawful. The evidence relied upon by the appellant was clearly taken into account with the required degree of anxious scrutiny by the Judge who was not required to set out findings in relation to each and every aspect of that evidence.
28. The appellant in her witness statement refers extensively to her medical circumstances in the United Kingdom claiming that she should be allowed to remain in the UK for all her follow-up checks and possible risks relating to her pacemaker, claims to be unwilling to return to Brazil as she requires the most effective medical attention, is critical of the hospitals in Brazil, and clearly believes that her choice of wishing to remain in the UK should be determinative. This despite the treatment which she has received in the UK at considerable costs being something she may not have been legally entitled to in the absence of any form of lawful leave.
29. The appellant in her witness statement from [42] sets out details of her private life in the United Kingdom, which was accepted as existing by the Judge, but does not set out any convincing argument as to why any interference with that private life would make the respondent's decision not proportionate, such as to make the Judge finding that it is erroneous.
30. In relation article 8 ECHR and health issues, it was not established that if removed to Brazil any the deterioration in the appellants health as a result of not having access to her current treating physician and facilities in the United Kingdom meant the right to respect for her private life required that she be granted leave to remain in the UK.
31. In GS (India); EO (Ghana); GM (India); PL (Jamaica); BA (Ghana) and KK (DRC) v SSHD [2015] EWCA Civ 40 it was held that if the Article 3 claim failed, Article 8 could not prosper without some separate or additional factual element which brought the case within the Article 8 paradigm: the core value protected being the quality of life, not its continuance. That meant that a specific case must be made under Article 8. The rigour of the D exception for the purpose of Article 3 in such cases as these applied with no less force when the claim was put under Article 8. Although the UK courts have declined to state that Article 8 could never be engaged by the health consequences of removal from the UK, the circumstances would have to be truly exceptional before such a breach

could be established (paras 45, 85 – 87 and 106 – 111). At paragraph 111, Underhill LJ said this "First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging Article 8: if that is all there is, the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle."

32. In MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 the Court of Appeal noted that the courts had declined to say that Article 8 could never by engaged by the health consequences of removal but they had never found such a breach and had not been able to postulate circumstances in which such a breach was likely to be established. The only cases where the absence of adequate medical treatment in the country to which a person was to be deported would be relevant to Article 8 was where it was an additional factor to be weighed in the balance with other factors that engaged Article 8 (paras 17 – 23).
33. In SL (St Lucia) [2018] EWCA Civ 1894 the Court of Appeal commented that the focus and structure of Article 8 is different from Article 3. They were unpersuaded that Paposhvili had any impact on the approach to Article 8 claims. An absence of medical treatment in the country of return would not of itself engage Article 8. The only relevance would be where that was an additional factor with other factors which themselves engaged Article 8. Razgar was referred to for the proposition that only the most compelling humanitarian considerations were likely to prevail over legitimate aims of immigration control. The approach set out in MM (Zimbabwe) and GS (India) was unaltered by Paposhvili.
34. See also Secretary of State for the Home Department v PF (Nigeria) [2019] EWCA Civ 1139 which helpfully summarises all the recent cases.
35. The issue in this case, as it is in all proportionality assessments, is whether an examination of the facts establishes circumstances of sufficient strength and weight to outweigh the public interest in the right of the Secretary of State to have an effective policy of immigration control. The conclusion of the Judge that the respondent had established that the decision was proportionate on the basis that the public interest had not been outweighed, which is the only conclusion that can be reached by the Judge dismissing the appeal on all grounds, and which can be inferred if not expressed in such terms, has not been shown to be a finding outside the range of those available to the Judge on the evidence.
36. Whilst the appellant wishes to remain in the United Kingdom the grounds fail to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

37. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

38. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated the 10 November 2020