Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04196/2020**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On the 21st October 2021

Decision & Reasons Promulgated
On the 16th November 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

KENNEDY KWAME TENDAYI MUNAWA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Da Silva of Fountain Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe who was born on 29 December 1975. On 24 January 2020, the appellant applied for leave to remain as the partner of a British citizen (Hilary Ward) under Appendix FM of the Immigration Rules (HC 395 as amended). On 4 March 2020, the Secretary of State refused the appellant's application for leave and also his claim under Art 8 of the ECHR.

2. The appellant appealed to the First-tier Tribunal. In a decision sent on 30 April 2021, Judge M Dorrington dismissed the appellant's appeal under Art 8 of the ECHR. The judge found that it would not be disproportionate to return the appellant to

Zimbabwe, in essence, because it would be only for a "relatively short period of time" in order to make an application for entry clearance as a partner which would be successful. Further, the judge did not accept that Art 8 would be breached on the basis that the appellant, who is HIV positive, would be unable to access appropriate treatment in Zimbabwe.

3. The appellant appealed to the Upper Tribunal on two grounds. First, the judge failed properly to carry out the balancing exercise under Art 8, in particular in concluding that the appellant would succeed in an entry clearance application as the evidence before the judge demonstrated that he would not be able to meet the financial requirements of the Rules based upon his partner's income ("Ground 1"). Secondly, the judge erred in his assessment of whether the appellant would be able to access HIV treatment that he required in Zimbabwe ("Ground 2").

4. On 9 July 2021, the First-tier Tribunal (Judge Feeney) granted the appellant permission to appeal on all grounds.

5. The appeal was listed for an error of law hearing at the Cardiff Civil Justice Centre on 21 October 2021. The appellant was represented by Mr Da Silva and the respondent by Mr Howells.

6. At that hearing, I heard oral submissions from Mr Da Silva who relied upon a skeleton argument submitted in advance of the hearing and I also heard oral submissions from Mr Howells.

7. Mr Da Silva relied upon his skeleton argument and the two grounds of appeal. As regards Ground 1, he contended that the judge's approach to Art 8 was legally flawed including the judge's conclusion that the appellant's return to Zimbabwe would only be for a short period because he would succeed in obtaining entry clearance. Mr Da Silva submitted that the evidence did not support that conclusion in respect of the sponsor's income which was only £18,000 rather than the required £18,600 under the Rules. He contended that the judge's assessment of the balancing exercise under Art 8 was legally flawed. As regards Ground 2, in relation to the treatment available and accessible to the appellant for HIV in Zimbabwe, the judge had failed to give adequate reasons, and not taken into account all the evidence, in concluding that that treatment was both available and, in fact, accessible to the appellant on the basis of his ability to pay for that treatment.

8. Having heard Mr Da Silva's submissions, Mr Howells conceded that the judge's decision was legally flawed and unsustainable. He did so essentially for three reasons.

9. In relation to Ground 1, Mr Howells conceded that the judge had failed properly to consider the appellant's claim under Art 8.

10. First, Mr Howells accepted that the crucial requirement under the Rules which the appellant had to establish as a 'partner' was set out in para EX.1 and the requirement that he establish that there were "insurmountable obstacles" to his family life with

his partner continuing in Zimbabwe. Mr Howells accepted that at paras 42–55 of his determination, the judge had failed properly to consider this issue which, he conceded, was readily apparent from para 54. In para 54 the judge said this:

> "In the short term, there is no evidence to persuade me that there would be 'insurmountable obstacles' to a family life that amounted to very significant difficulties even if Hilary Ward were to remain in the United Kingdom. There is Skype, FaceTime, Messenger services, the telephone and other means of staying in touch".

11. Mr Howells conceded that the judge had wrongly looked at the issue of "insurmountable obstacles" on the basis that there were none if the appellant were to go to Zimbabwe and his partner were to remain in the United Kingdom. The correct approach in considering para EX.1 was to consider whether there were "insurmountable obstacles" to the appellant and his partner both going to Zimbabwe to continue their family life.

12. Secondly, Mr Howells accepted that the judge had also, in finding that it would not be disproportionate for the appellant to return to Zimbabwe for a short period of time in order to obtain entry clearance, wrongly concluded on the evidence that he would succeed in obtaining entry clearance under the Rules as the evidence did not establish that he would meet the financial requirements in Appendix FM as the evidence disclosed income by the sponsor falling short of the £18,600 threshold. Mr Howells accepted that, therefore, the judge's application of Chikwamba v SSHD [2008] UKHL 40 was flawed.

13. On this basis, Mr Howells accepted that the judge had wrongly approached the first issue in respect of his Art 8 claim, namely whether he could succeed under the Immigration Rules both in country and in obtaining entry clearance, and the judge's findings were unsustainable.

14. As regards Ground 2, Mr Howells pointed out that the appellant relied exclusively upon Art 8 (and not Art 3) in relation to his claim based upon his not inability to access treatment for HIV in Zimbabwe. Mr Howells accepted that the judge's finding, that the appellant could not succeed outside the Rules, was materially flawed as he had made that finding taking forward his findings made in relation to the Rules themselves (see para 58 of the decision). As the findings in respect of the Rules were flawed, Mr Howells accepted that the judge's decision in relation to Art 8 outside the Rules was materially affected and also legally flawed as a result.

15. Mr Howells accepted that the judge's decision should be set aside; none of his findings should be preserved and the decision should be re-made *de novo*.

16. In the light of Mr Howells' concession, it was unnecessary for Mr Da Silva to reply.

17. After some discussion, Mr Da Silva and Mr Howells were content that the disposal of the appeal should be to remit it to the First-tier Tribunal for the decision to be re-made *de novo*. As I indicated at the hearing, the appellant will have the opportunity to file any additional evidence in relation to his claim, including the availability and

accessibility of treatment for his HIV in Zimbabwe at the hearing of the remitted appeal.

18. I accept Mr Howells' submissions that the judge, for the reasons outlined by him, materially erred in law in reaching his decision to dismiss the appeal under Art 8 of the ECHR.

Decision

19. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.

20. Having regard to the nature and extent of fact-finding required, including potentially further oral evidence from the appellant and his partner, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Dorrington.

Signed

Andrew Grubb

Judge of the Upper Tribunal
26 October 2021