Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18299/2019 (R)

THE IMMIGRATION ACTS

Remote Hearing by Skype for Business	**Decision & Reasons Promulgated**
On 5th January 2021	**On 9th March 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WILLIAM RUPERT BROWN
(Anonymity Direction Not Made)

Respondent

Representation:
For the Appellant: Mrs H Aboni, Senior Home Office Presenting Officer
For the Respondent: Ms U Uwaezuoke, IAS Immigration Advice Service

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Brown. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Brown as the appellant, and the Secretary of State as the respondent.

2. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. Neither party objected to a remote hearing. I sat at the Birmingham Civil Justice Centre. I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. The appellant and his partner joined the hearing remotely and were able to see and hear me and the representatives throughout. I was satisfied: that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

3. The respondent appeals the decision of First-tier Tribunal Judge O'Hagan to allow the appellant's appeal against the respondent's decision to refuse his application for leave to remain in the UK on the basis of his family life with his partner Helen Wilson, for reasons set out in a decision promulgated on 16th January 2020.

4. The respondent refers to paragraphs [26] and [27] of the decision and claims Judge O'Hagan allowed the appellant's appeal on Article 8 grounds with the sole determining factor being the disparity of healthcare between the UK and New Zealand and the lack of availability of medication that the appellant currently receives in the UK, in New Zealand. The respondent refers to paragraph [111] of the decision of the Court of Appeal in GS (India) & Others v SSHD [2015] EWCA Civ 40 and claims the appellant's medical treatment is the only factor that Judge O'Hagan finds, in itself, gives rise to a breach of Article 8.

5. Permission was granted by First-tier Tribunal Judge Adio on 15th April 2020.

6. Mrs Aboni relied upon the written submissions made on behalf of the respondent dated 15th July 2020. The respondent submits that at paragraph [26] of his decision, Judge O'Hagan stated that he was not persuaded by the evidence that there would be insurmountable obstacles to the appellant, if viewed in isolation from his health, continuing his life with his partner in New Zealand. However, at paragraph [27], Judge O'Hagan then directed himself that the matter hinges on the issue of the appellant's health, and whether the difficulties arising from that, are such as to give rise to insurmountable obstacles. The respondent submits Judge O'Hagan allowed the appeal with the sole determining factor being the disparity of healthcare between the UK and New Zealand and the lack of availability of the medication that the appellant currently receives in the UK, in New Zealand. The respondent submits the approach adopted by Judge O'Hagan is contrary to the principles set out by the Court of Appeal in GS (India) & Others v SSHD [2015] EWCA Civ 40 and SL (St Lucia) v SSHD [2018] EWCA Civ 1894. The respondent submits the judge materially erred in finding that the exceptions to certain eligibility requirements for leave to remain as a partner, referred to in Section EX of Appendix FM are met, and allowing the appeal for the reasons set out. Mrs Aboni submits that although the respondent's published guidance to caseworkers - Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes – states *(at page 55)* that "*..independent medical evidence could establish that a physical or mental disability, or a serious illness which requires ongoing medical treatment, would lead to very serious hardship: for example, due to the lack of adequate health care 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 an insurmountable obstacle to family life continuing overseas.*", that is a factor that is relevant, but cannot be determinative or the only factor where there are no other obstacles to the family life continuing abroad.

7. In reply, Ms Uwaezuoke relied upon the appellant's skeleton further submissions and submits the decision of the First-tier Tribunal does not disclose any material misdirection in law and properly read, Judge O'Hagan did not allow the appeal solely because of the disparity of healthcare and the lack of availability of medication that the appellant currently receives in the UK, in New Zealand. She submits Judge

O'Hagan carefully considered the appellant's health as part of the overall assessment of the Article 8 balancing exercise to determine whether the decision to refuse leave to remain amounts to a disproportionate interference to the Article 8 rights of the appellant. She submits Judge O'Hagan properly directed himself at paragraph [16] that he was bound to consider the appeal solely on the basis of whether the decision breaches the appellant's human rights, and more broadly, the human rights of those others affected by the decision. Ms Uwaezuoke submits that at paragraphs [22] to [35] of his decision Judge O'Hagan properly refers to the relevant legal framework and carefully considered all the evidence before the Tribunal before reaching a decision that was plainly open to the Tribunal.

Discussion

8. In my judgment, the respondent has failed to establish that the decision of First-tier Tribunal Judge O'Hagan is vitiated by a material error of law.

9. As Judge O'Hagan set out at paragraph [16] of his decision, the only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. Judge O'Hagan found the appellant has established a family life in the UK. It was undoubtedly open to him to do so. He found the decision to refuse the appellant leave to remain is of sufficient gravity as to potentially engage the operation of Article 8(1). He accepted the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control. The issue in this appeal, as is often the case, was whether the interference is proportionate to the legitimate public end sought to be achieved.

10. Although the appellant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, it was capable of being a weighty factor, when deciding whether the refusal of the application for leave to remain is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration

rules would usually mean that there is nothing on the Secretary of State's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules.

11. The appellant applied for leave to remain in the UK on the basis of his family life with his partner. It was common ground between the parties that the appellant is unable to meet the minimum income requirement set out in paragraph E-LTRP.3.1 of Appendix FM of the immigration rules. As that requirement could not be met the appellant was unable to meet the requirements for limited leave to remain as a partner unless Section EX.1 applies. That is, the appellant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, and there are insurmountable obstacles to family life with that partner continuing outside the UK. At paragraph [23] of his decision, Judge O'Hagan referred, quite properly, to Section EX. 2 of Appendix FM which states:

> "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 all would entail very serious hardship the applicant or their partner."

12. The specific question being addressed by Judge O'Hagan was whether the appellant has established that there are insurmountable obstacles to family life with his partner continuing outside the UK. At paragraph [24] of his decision Judge O'Hagan referred to the decision of the Supreme Court in R (Agyarko) v SSHD [2017] UKSC 11. Lord Reed confirmed the words 'insurmountable obstacles' mean not only obstacles which make it literally impossible for a family to live together in the non-national's country of origin but are to be understood in a practical and realistic sense, as a stringent test.

13. First-tier Tribunal Judge O'Hagan heard evidence from the appellant, his partner and his partner's mother. In reaching his decision he also had regard to the medical evidence that was before the First-tier Tribunal relating to the health the appellant

and in particular the treatment he has received. At paragraphs [26] and [27] of his decision he said:

> "26. I am not persuaded by the evidence that there would be insurmountable obstacles to the appellant, if viewed in isolation from his health, continuing his life with Ms Wilson in New Zealand. He has not advanced any arguments that he could not do so, other than those arising from his health.
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> 27. The matter hinges, then, on the issue of the appellant's health, and whether the difficulties arising from that are such as to give rise to insurmountable obstacles…"

14. Judge O'Hagan referred to the diagnosis made and having considered the clinical picture set out in the letters from a specialist nurse and consultant responsible for managing the appellant's condition, Judge O'Hagan found that the condition suffered by the appellant (i) is at the severe end of the spectrum, (ii) has been subject to recurrent flareups, and (iii) has proved difficult to treat in the appellant's case. He noted the appellant had proved unresponsive to, or intolerant of, the conventional disease modifying drugs which were tried. He noted however that the appellant has responded well to a particular form of medication, and since he has been taking that, many inflammatory aspects of the condition have been brought under a reasonable degree of control. At paragraph [29] of his decision, Judge O'Hagan concluded that he did not consider the condition and resultant level of disability to be such that it would preclude the appellant from relocating if he were able to continue to receive treatment once he returned to New Zealand. However, on the evidence before him, he was satisfied that the medication the appellant has responded to, is not available in New Zealand. He found the likelihood therefore is that the appellant's condition would again deteriorate if he were to return to New Zealand.

15. Judge O'Hagan considered the impact that the deterioration in the mental and physical health of the appellant would have upon the appellant and his partner individually, and as a couple. He referred to the physical and mental health of the appellant previously, noting the appellant experienced considerable pain and incapacity when his condition was uncontrolled before he began receiving his current medication. At paragraph [33], he concluded that it is likely that were the appellant and his partner to relocate to New Zealand, the appellant's physical and

emotional health will deteriorate, and that would lead to a deterioration, and quite possibly a cessation of their relationship. At paragraph [34] he found that there are obstacles to the appellant and his partner continuing their lives in New Zealand which could not be overcome or would entail very serious hardship for the parties, and so which are insurmountable.

16. Paragraph [111] of the judgement of Underhill LJ in GS (India) v SSHD [2015] EWCA Civ 40 must be read in context. It is founded upon the judgment of Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in MM (Zimbabwe) [2012] EWCA Civ 279. At paragraph [23] Moses LJ said:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to 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."

17. Having referred to paragraph [23] of the judgment of Moses LJ in MM (Zimbabwe), in GS (India) v SSHD, Laws LJ, said at [87]:

> "With great respect this seems to me to be entirely right. It means that a specific case has to be made under Article 8…."

Underhill LJ added at [111]:

> "There are possibly some ambiguities in the details of the reasoning in that passage, but I think it is clear that two essential points are being made. 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 fact 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 or 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."

18. In SL (Saint Lucia) v SSHD [2018] EWCA Civ 1894, the Court of Appeal considered whether Paposhvili had any impact on the approach to Article 8 claims but rejected that submission. At [27], Hickinbottom LJ said:

> "As I have indicated and as GS India emphasises, article 8 claims have a different focus and are based upon entirely different criteria. In particular, article 8 is not article 3 with merely a lower threshold: it does not provide some sort of safety net where a medical case fails to satisfy the article 3 criteria. An absence of medical treatment in the country of return will not in itself engage article 8. The only relevance to article 8 of such an absence will be where that is an additional factor in the balance with other factors which themselves engage article 8."

19. The decisions relied upon by the respondent do not establish that Article 8 can never be engaged by the health consequences of removal from the United Kingdom, albeit that exceptional circumstances would have to established before a breach were established. A fact specific assessment is required. In my judgment, Judge O'Hagan carefully considered the evidence before the Tribunal. He was not persuaded that there would be insurmountable obstacles to the appellant, if viewed in isolation from his health, continuing his life with his partner in New Zealand. However having carefully considered the medical evidence that was before the Tribunal and more importantly, the very significant impact that any deterioration in the physical and mental health of the appellant would have on the appellant and his partner individually and cumulatively, he concluded that on the evidence, he was satisfied that there are insurmountable obstacles to the appellant's family life with his partner continuing outside the UK. That is not, in my judgement, to say that the fact the appellant is receiving treatment in the UK that would not be available to him in New Zealand was treated by Judge O'Hagan as the only reason for allowing the appeal on Article 8 grounds. It was a decision reached upon the strength of the evidence that was before the First-tier Tribunal regarding the health of the appellant and the likely impact upon the relationship between the appellant and his partner. In my judgment, when the decision is read as a whole it was a factor that he considered in the overall assessment of proportionality. It was a fact specific analysis. It was a factor that he balanced against the physical and emotional impact upon the appellant and his partner individually and jointly as a couple and the likely deterioration, and

possible cessation of the relationship. It is not in my judgement a decision that offends the "no obligation to treat" principle.

20. The assessment of an Article 8 claim such as this and the consideration of whether removal is proportionate, is always a highly fact sensitive task. The findings and conclusions reached by Judge O'Hagan were in my judgment, neither irrational nor unreasonable in the Wednesbury sense, or findings and conclusions that were wholly unsupported by the evidence. They were based on the particular facts and circumstances of this appeal and the strength of the evidence before the Tribunal, both written and oral. In my judgment, in reaching his decision, Judge O'Hagan clearly applied the correct test. It was open to him to find that the stringent test has been met and the appellant has established that there are insurmountable obstacles to family life with his partner continuing outside the UK for the reasons set out in his decision. Where a judge applies the correct test, and that results in an arguably generous conclusion, it does not mean that it was erroneous in law.

21. It follows that in my judgment, there is no material error of law in the decision of Judge O'Hagan and I dismiss the appeal.

Decision

22. The appeal is dismissed. The decision of First-tier Tribunal Judge O'Hagan promulgated on 16th January 2020 shall stand.

Signed *V. Mandalia* Date: 1st March 2021

Upper Tribunal Judge Mandalia