



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/08310/2014

THE IMMIGRATION ACTS

Heard at Field House
On 16th July 2015

Decision & Reasons Promulgated
On 2nd September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JUDITH OKPAISE

Claimant

Representation:

For the Appellant:

Ms J Isherwood, Senior Presenting Officer

For the Claimant:

Ms G Peterson, Counsel instructed by Supreme Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Robinson allowing the Claimant's appeal on human rights grounds with reference to Article 8 ECHR, against her decision to refuse her asylum, humanitarian protection and human rights claim and against removal directions set for the Claimant's country of origin, Nigeria.
2. First-tier Tribunal Judge Robinson dismissed the grounds of appeal concerning asylum and Article 3 ECHR but allowed the appeal on human rights grounds with

reference to Article 8 ECHR on the basis that the decision was a disproportionate interference with her family and private life.

3. The Appellant appealed against that decision. The grounds may be summarised as follows:

(i) The judge erred in deciding there are reasons to go outside the Immigration Rules, because the appellant is in receipt of medical care and is dependent on relatives in the UK, the judge did not state that treatment was not available in Nigeria but said that the societal prejudice in Nigeria may make it difficult to access the care she needs (see paragraph 73 of the decision);

(ii) The judge has not reconciled his negative credibility findings in relation to the asylum claim in finding that the family situation in Nigeria is as stated.

4. The Appellant was granted permission to appeal by First-tier Tribunal Judge Levin by way of a decision which stated inter alia as follows:

“Given that the Judge found that Article 3 of the ECHR was not breached on medical grounds it is arguable that the Judge’s decision to allow the Appeal under Article 8 on medical grounds is flawed having regard to the judgment of the Court of Appeal in *GS (India) and others* [2015] EWCA Civ 40. It is also arguable that the Judge erred in failing to have regard to the factors set out in section 117B of the 2002 Act in his assessment of the Appellant’s appeal on Article 8 grounds. For these reasons both the grounds and the decision disclose arguable errors of law”.

5. I should observe that neither the *GS (India)* point nor the section 117B point were taken by the Appellant in her grounds seeking permission and were not said to be *Robinson* obvious either. It is unclear to me how the original grounds correlate to those two new points; however as permission was granted on that basis, I entertained submissions on the grounds as well as Judge Levin’s grant.

6. I was not provided with a Rule 24 response from the Claimant.

Submissions

7. In advancing the Secretary of State’s grounds of appeal, Ms Isherwood submitted inter alia that the judge did not find the asylum claim credible (see paragraph 45) and that the Reasons for Refusal Letter claimed that other family members remained in Nigeria (at paragraphs 5, 6, 43, 89, 93 of that Letter), which the judge failed to resolve at paragraph 67 of the decision. Consequently, the Appellant submitted there is support available in Nigeria to the Claimant and having refused the asylum claim, the judge should have found that there were family members remaining in Nigeria. Ms Isherwood submitted that *GS & EO (Article 3 – health cases) India* [2012] UKUT 397 (IAC) mentions the burden on the state and the public interest as matters that must be considered and given the Appellant’s immigration history and her being an overstayer, she could not benefit from the decision in *GS*. Miss Isherwood also pled reliance upon the first headnote in *Akhalu (health claim: ECHR Article 8) Nigeria* [2013] UKUT 400 (IAC) which reaffirmed the ratio in *MM (Zimbabwe) v Secretary of State for*

the Home Department [2012] EWCA Civ 279, that the countervailing public interest is a material consideration of central importance which will outweigh the adverse consequences for a claimant's health due to disparity of health care facilities in all but a very few rare cases. Finally, Ms Isherwood also pled reliance upon section 117B of the 2002 Act, as raised by Judge Levin and submitted that the judge had not taken into account the burden on the state and there was no evidence to show financial independence and payment for medical treatment.

8. I then heard submissions from Ms Peterson who submitted in reply inter alia that she relied on [51-52] of *Akhalu* confirming that the Article 8 analysis is a fact-based assessment. As counsel instructed in this matter at the First-tier Tribunal, Ms Peterson highlighted that the judge had the benefit of hearing all the evidence and making his own independent observations. Evidence was given by family members of the Appellant. For example, the Appellant's uncle had confirmed in his oral evidence that he had supported her throughout her childhood. Similarly, his witness statement stated that he was unaware of the Appellant's remaining family in Nigeria. Ms Peterson emphasised that the disparity of medical treatment between that received here and that available in Nigeria was not an argument advanced by the Appellant but on the basis of Article 8 ECHR. In reply to Judge Levin's grant of permission, I was reminded that *GS (India)* was in fact mentioned explicitly in the judge's decision and *GS (India)* referred to the point in *MM (Zimbabwe)* in respect of Article 8 arguments. She highlighted that the judge made suitable findings on all issues challenged by the Secretary of State at paragraphs 61, 66 and 68-71. Ms Peterson submitted that [111] of Lord Justice Underhill's judgment in *GS (India)* (which sets out [23] of *MM (Zimbabwe)* in turn) affirms that the health provisions in the receiving country cannot be a determinative factor but are a factor to be considered amongst others and the absence or inadequacy of medical treatment in the country of return may be a factor in the proportionality exercise.
9. Ms Peterson highlighted that the presenting officer at the First-tier made submissions on section 117B. Ms Peterson submitted that paragraph 75 of the decision specifically takes the public interest into account. The judge explicitly considered the consequences of weighing all countervailing factors resulting in removal at paragraph 75 of the decision; however, on balance, his findings at paragraph 76 demonstrate that the judge came down in the Claimant's favour, which was a decision that he was entitled to reach having taken the preceding factors into account. She submitted that the Secretary of State disagreed with the decision, but all the necessary factors were considered and the necessary conclusions are set out at paragraph 76. The judge was aware of the public interest and mentions it at paragraph 78, however he explicitly finds that the public interest is outweighed. This is an appeal that consequently succeeded on its own individual circumstances.
10. In response to my query, Ms Peterson confirmed that the Appellant is living with her uncle and his wife and is provided with financial and other support by her family here.

11. In concluding her application, Ms Isherwood submitted that the judge finds private life exists from support organisations but the 2002 Act says little weight should be given to private life. That is stated at paragraph 69 but it is not carried through at paragraph 75.
12. I asked both parties at the close of submissions whether they had anything further to add and both confirmed that they did not.

No Error of Law

13. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.
14. In relation to the first ground (repeated at paragraph 4(i) above), I am satisfied that this ground amounts to nothing more than a disagreement with the conclusions reached and findings made by the judge. There is no perversity or irrationality pointed to in the ground itself as originally pled and although Ms Isherwood did her best to address me on parallels between the instant appeal and that of *Akhalu and GS and EO*, she was to my mind unable to point to any legal error in the judge's reasoning or findings that were not open to him to make. The fact that the judge "did not state that treatment was not available in Nigeria but said that the societal prejudice in Nigeria may make it difficult to access the care she needs" is not fatal for the claim and in fact in of itself would not be sufficient for the appeal to have succeeded in harmony with Lord Justice Underhill's observations in *GS (India)* at [111] in relation to the "no obligation to treat" principle. However, the fact remains that the Claimant wisely did not pursue that argument at the First-tier Tribunal, which would have been bound to fail, and so arguments on this issue, which was never taken, have no relevance. The fact that the Claimant "is in receipt of medical care and is dependent on relatives in the UK" speaks in her favour as factors that take the matter within the Article 8 ambit and warrant further consideration in terms of the overall proportionality of her proposed removal. The judge's assessment of Article 8 being engaged is sufficiently reasoned at paragraph 62 in any event and the decision must be read as a whole.
15. The second ground concerning the credibility findings is also misconceived. The judge's findings at paragraph 45 relate to a land dispute which led to the murder of the Claimant's father not being made out and the conclusion that the claim has been fabricated to explain her unlawful stay in the UK. It is important to note the Claimant's immigration history reflected at paragraph 6 of the decision. She arrived in the UK on 27 December 2012 and she claims her father was murdered in Nigeria in January 2013. The conclusion that the father was not murdered due to a land dispute and that she need not have overstayed is a discrete factual assessment of the asylum claim. As the claim was made to justify her overstaying her visit visa in mid-2013, this claim is far removed and distinguishable from the fact that she fell ill later on and was diagnosed with HIV the next year, in January 2014 and started antiretroviral therapy in February 2014. The two subjects are not necessarily linked and it does not

follow that simply because the Claimant fabricated an asylum claim, her claim concerning family life with her uncle and his wife (being the closest relatives she has remaining) should be disbelieved. The judge was very much aware of the distinction between these facts as made clear by paragraph 62 of his decision.

16. In relation to the passages referred to me by Ms Isherwood showing that family support exists in Nigeria, firstly, the Refusal Letter itself at §§5-6 acknowledges that the Claimant has no siblings and that her mother abandoned her when she was 7 years old. The fact that the Refusal Letter rehearses the Claimant's answer at interview (AIR 50) that her father had "many half brothers and sisters" (paragraph 43) is inconsequential when the Letter at paragraph 89 does not contend that familial support networks *are* available in Nigeria. The fact that the Letter at paragraph 93 states that there was no evidence provided of any family ties to the UK is irrelevant where the judge in his opinion has independently accepted that the Claimant has a family life with her uncle and his wife at §68 of the decision. In any event, none of those factors precludes the judge from making the findings of fact that he did.
17. It is perfectly acceptable for a judge to accept specific parts of an Appellant's account and not others pursuant to *Chiver (Asylum; Discrimination; Employment; Persecution) (Romania)* [1994] UKIAT 10758. In that same decision, it was further observed by the Tribunal as follows:

"... an appeal Tribunal would be extremely sparing in reviewing an adjudicator's decision as to the credibility of a witness or witnesses whom the adjudicator had seen or heard giving oral evidence and the Tribunal had not" (see *Alam Bi v IAT* [1979-1980] Imm AR 146 at p.151)

... It is perfectly possible for an adjudicator to believe that a witness is not telling the truth about some matters, has exaggerated the story to make his case better, or is simply uncertain about matters, but still to be persuaded that the centre piece of the story stands. This is particularly so where the critical criterion for an adjudicator is the reasonable likelihood of persecution occurring were a person to return to a particular country".

18. I find that the Judge reached findings upon the evidence before him that were open to him and which he was entitled to reach. It might be that another judge would not have reached the same conclusion on those facts; however those findings are neither perverse nor irrational in a *Wednesbury* sense for that reason. In that respect, I remind myself of the dicta of Baroness Hale in *Secretary of State for the Home Department v AH (Sudan) & Ors* [2007] UKHL 49, wherein the following was stated inter alia [at 30]:

"...This is an expert tribunal charged with administering a complex area of law in challenging circumstances... and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently".

19. Regarding Judge Levin's observations on *GS (India)* and the submissions made by Ms Isherwood, I find this ground is also not made out as paragraph 31 of the decision makes explicit reference to *GS (India)* and confirms health claims are not barred from success under Article 8 even though they may fail to meet the higher threshold of Article 3. That authority is considered in detail at paragraph 59 of the decision. Given the careful and detailed manner in which the judge audited his consideration of the competing interests under Article 8 and did not err by suggesting there was an obligation to treat, but in fact noted that treatment was available in Nigeria, and that the public interest is to ensure that the limited resources of the health service are for the benefit of those for whom they are intended before finding in favour of the Claimant due to her family support network that was not available in Nigeria; the judge was unarguably entitled to reach the conclusion that he reached.
20. Finally, in relation to the section 117B issue, it is clear to me that the judge had taken into account the burden on the state and the provision of medical treatment where the Claimant was not entitled to it. As to the other section 117B factors, I cannot see that the Claimant's ability to speak English and her dependence upon her uncle and lack of employment would speak against her. The judge's assessment of the public interest in substance is in keeping with the decision in *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC).
21. Therefore, in conclusion, the grounds do not reveal an error of law such that the decision should be set aside.
22. In the circumstances the appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal is affirmed.

Decisions

23. The appeal to the Upper Tribunal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Saini