



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16133/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 23rd July 2015

Decision & Reasons Promulgated
On: 13th August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MRS RUBAB HASSAN MOHAMMED TAKI KANJI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr R Solomon, counsel (instructed by Aschfords Law)
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Tanzania, born on 30 November 1941. She appeals with permission against the decision of First-tier Tribunal Judge who dismissed her appeal against the respondent's decision to refuse a grant of leave to remain as a dependent relative.
2. The appellant has visited the UK on many occasions since 1984 as a visitor. She last entered the UK on 27 June 2013. On 23 December 2013 she applied for leave to remain indefinitely "in the context of Article 8 ECHR" [3].
3. The Judge has set out her statement in great detail [5]. In her statement accompanying her application she said that she was a 72 year old Tanzanian citizen. However, she has resided in Kenya for the last 46 years on a "dependant's pass." Her husband passed away on 7 July 2011. She has a daughter who lives in the UK with her husband and their three sons. The appellant owns a flat in Mombasa.

4. She has visited the UK on five occasions prior to her last visit and has never overstayed. After her husband passed away, she has felt extremely low, lonely and lost. Her health has worsened. She is unable to live in Mombasa any more. She is scared to live on her own and has experienced nightmares. She has twice been burgled. She has no siblings in Mombasa. Her in laws are not able to support her.
5. She claimed to suffer from many health problems. Her condition worsened since last year. She asserted that she is unfit to travel and has severe osteoarthritis in both her knees. She finds it difficult to carry out daily tasks involving walking or climbing stairs. In Mombasa she has fallen many times in the street and has been helped by strangers. On one occasion in 2013, she fell to the ground in a public area and fractured her nose. Her walking has not only slowed down but has also reduced her confidence. Her daughter and son in law could not come to Mombasa to look after her because of their work commitments and so she came to the UK. She has high blood cholesterol and needs medication to keep it under control. She has an over-active thyroid, requiring her to have medication for life.
6. She referred to the help she has received from family members. In Mombasa she had to use public transport which was mainly by rickshaw taxi. Her late husband's business closed down in January 2013. She receives no monthly income. The flat does not generate income. She has lived in Mombasa as her husband's dependant and now that he is not around, it will not be possible for her. She left Tanzania 46 years ago and living there again is not feasible. Renting a house in Tanzania would be very expensive for her as at present she does not pay any rent. The move and the expenses there would be financially impossible. She is scared of having a live in housemaid due to her previous experiences. The Judge also considered lengthy statements filed by the appellant's son in law and a number of members of her close family.
7. The Judge considered the appellant's claim since the implementation of Appendix FM of the rules. The requirements of such an application are set out in paragraphs E-ECDR.2.4-5 of that appendix. The rules state that adult dependent relative applications must be made from outside the UK [32].
8. Further, he noted that the specified evidence provisions in Appendix FM-SE requires that evidence referred to in paragraphs 34-37 must be provided. The requirements are consequently more rigorous. He stated that one of the specific objectives of the changes was to ensure that visit visas should not be abused. Accordingly, the possibility of making an in-country application under the rules has been eliminated [33-34].
9. The Judge dealt with the appellant's case on the basis that she had not always intended to remain in the UK. She did have a return ticket [35]. There was accommodation and the means to look after the appellant properly. The relatives had the best intentions in wishing to do so.
10. Although the argument before him was put on the basis that the appellant would have met the requirements of the new rules and that it would be disproportionate to send her back, the Judge stated that the flaw in that argument was that "...it will

almost invariably be far from clear whether that would have been the case, particularly in looking closely at all the hurdles set by the new rules” [37]. Making an application such as the present one “...completely (and unfairly) bypasses altogether the requirements of the new rules.” It was also far from clear that they would have been met in this particular case [38].

11. Independent medical evidence under the rules “must” come from a doctor or other healthcare professional in the home country who can assess the appellant in her own environment. The brief medical reports from Kenya are historical in nature and do not address the matters that the rules require at all [39].
12. The Judge had regard to a report from an independent social worker; who gave no indication of medical qualifications [41]. The report did not even acknowledge the existence of the immigration rules in relation to these matters [41].
13. As the Judge “understood it” the appellant still has a home in Kenya to which she had been intending to return [42]. Her claim that she would not be able to go back to live in Kenya on what was “a dependant’s pass” was not accepted by the Judge in the absence of any evidence in this respect [43]. Residence in Kenya for the best part of 50 years “must count for a lot and the appellant was of course perfectly able to go on living there for several years after her husband died.” [43]
14. The Judge stated [44] that there was some confusion caused by the fact that the removal directions are to Tanzania. This is the country of her citizenship. She has not lived there for all that time. If the removal directions are appropriate and what the precise inter-relationship is between Kenya and Tanzania on matters such as this is something upon which he heard no evidence at all. That would be a matter for the respondent when the time came for the family to respond to if they wished [44].
15. A decision to remove was however considered. The respondent decided that she should be removed by way of directions under s.47 of the 2006 Act.
16. It was further stated in the respondent’s decision that if she chose not to appeal the decision, or if her appeal were unsuccessful, she must leave the UK as soon as possible, when her leave to remain here expires. If she does not leave the UK voluntarily, she will be removed “to Tanzania.” That decision was served on the appellant on 20 March 2014.
17. The Judge further found that the requirements of the new rules in relation to Article 8 were not met. Nor would there be “very significant obstacles” to her integration into life in the country to which she would be returned [45]. That country was stated to be Tanzania.
18. Even assuming there were exceptional circumstances requiring consideration beyond the rules, he found that requiring her “to go home” would be proportionate in the overall interests of immigration control. He had regard to paragraph 117B of the Nationality, Immigration and Asylum Act 2002, and in particular that the maintenance of effective immigration controls is in the public interest [46].

19. The Judge stated that it is important that the new rules for entry clearance of adult dependent relatives are not simply bypassed by obtaining a visit visa and then making an in country application which is precluded by the rules. He found that there were no exceptional circumstances in this case warranting consideration beyond the rules.
20. The appeal was accordingly dismissed under the Immigration Rules and on human rights grounds.
21. On 23 April 2015, Upper Tribunal Judge Kebede granted the appellant permission to appeal to the Upper Tribunal. There was merit in the assertion that the Judge failed to give adequate consideration to the medical and other evidence in regard to the appellant's healthcare needs and that inadequate consideration was given to her position on return to Tanzania.
22. Mr Solomon submitted that the Judge's reasoning that the current rules had eliminated altogether the possibility of making an in country application [34] is incompatible with "the proposition in Chikwamba". The Judge failed to pay sufficient regard to its significance. In Chikwamba [2008] UKHL 40, the House of Lords made plain that in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the rules from abroad, that legitimate objective would usually be outweighed by factors resting on the appellant's side of the balance. Mr Solomon also relied on the Court of Appeal's subsequent decision in Hayat [2012] EWCA Civ 1054.
23. It is further contended that the Judge did not have regard to the decision in Chen v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 where Upper Tribunal Judge Gill stated that Appendix FM does not include consideration of the question of whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the secretary of state evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely on case law concerning Chikwamba.
24. Mr Solomon referred to paragraph 33 of his skeleton argument before the First-tier Tribunal which revealed that he had relied on Chikwamba and Hayat. He submitted that there was no sensible reason why the appellant should be required to leave to make an application for entry clearance, given the disruption that would be caused, having regard in particular to her vulnerability. The 'Chikwamba' principle is not confined to cases where children are involved. He referred to MA (Pakistan) [2009] EWCA Civ 953 where Lord Justice Sullivan stated that the real question was not whether there were "insurmountable obstacles" to the appellant's returning to Pakistan in order to make an application for entry clearance from there, but whether there was any sensible reason as to why he should be required to do so.

25. Mr Solomon submitted that the finding by the Judge that it was “far from clear” that the requirements of the rules would have been met in this particular case [38] is flawed. He failed to give adequate reasons for that finding. Nor do the rules (FM and FM-SE) provide that specified evidence *must* be provided in relation to the requirements of Appendix FM. The relevant paragraphs provide that evidence “should” (not “must”) take the form set out in paragraph 33. Nor does the appendix require that the evidence must come from a doctor or other healthcare professional in the home country [33].
26. Nor did the Judge take sufficient or any account of the appellant's son in law's evidence that it would be very difficult to get a full time carer or nurse in Kenya as they are hardly available and quite expensive to manage. Nor was sufficient account taken of the fact that the appellant had been burgled twice in her own home in previous years and felt terrified about this happening again as she would be on her own in the flat. On one occasion she had a live in housemaid and has been scared of having such a housemaid at home at night.
27. Nor did the Judge take proper account of the appellant's evidence that although she looked after herself during the two years after her husband died, her difficulties had simply increased the whole time and that her health has worsened. Whilst in Mombasa she has fallen many times in the street and on one occasion (early in 2013) fell in a public area and fractured her nose. Nor was her daughter's evidence properly assessed that when the appellant came here they were shocked with what they saw. Her mother had lost a lot of weight and was unstable on her feet. They were not aware that her condition had deteriorated to this extent. She did not look like she knew what she was doing. All this was contained in the daughter's witness statement.
28. At the hearing before the First-tier Tribunal, it had been argued that the appellant had been living in Kenya on a dependant's pass and would not be able to go back there to live. The finding by the Judge that there was an absence of any evidence in this respect was unsupported by the statement from her son in law dated 18 February 2013 where he claimed that the appellant had been living in Kenya as a dependant of her husband and had such pass. However, that pass expires in February 2014 and now that her husband has passed away she will no longer be able to acquire a dependant's pass.
29. The finding by the Judge that residence in the country for the past 50 years must count for a lot 'is purely speculative'.
30. Mr Solomon also submitted that the removal directions are to Tanzania. It was therefore incumbent upon the Judge to determine the claim on the basis of removal to that state. He had failed adequately to assess the position on that basis. That is particularly so having regard to his finding as regards paragraph 276ADE of the rules which speaks of “very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.”
31. He referred to his skeleton argument, where he contended that the appellant would no longer be able to acquire a dependant's pass. Directions for removal are to be to

Tanzania. She has no ties there. Alternatively there would be very significant obstacles to her integration. She has not lived there for some 46 years. She is old and vulnerable. She has nowhere to live and no-one to whom she can turn for support. The appellant had travelled on a Tanzanian passport and her dependant's pass had expired in February 2014.

32. Mr Solomon accordingly submitted that the Judge had “irrationally” decided that the appellant's situation should not be considered under Article 8 outside the rules. However, the rules do not adequately recognise the relationship of an in country adult dependent relative unless she has leave as such; insufficient account is taken of her welfare as an elderly and vulnerable widow; the rules take no account of the appellant's physical and moral integrity; the claim involves the separation of a close and committed family unit (paragraph 15 of the grounds).
33. In the circumstances, Mr Solomon submitted that there is a material error that has been established and the decision would have to be set aside and re-made. He submitted that this was an appropriate case for the appeal to be remitted for hearing before the First-tier Tribunal.
34. On behalf of the respondent, Mr Tufan submitted that the removal decision is a “non issue” if the decision is ultimately taken to remove the appellant to Tanzania. This can be challenged if the respondent were to insist on sending her there.
35. He submitted that the Judge had proper regard to the fact that the appellant had property in Kenya and submitted that the respondent would not force her removal to Tanzania.
36. The Judge properly concluded that the appellant's was not an exceptional case. At paragraph 37 the Judge stated that thousands upon thousands of elderly relatives become immobile and suffer from such conditions of arthritis and are subject to the risk of falling and other problems, generally becoming frailer. The difficulties are caused by bereavement at the appellant's age. The vast majority of those affected in this way have to do the best they can in their home country unless they meet the requirements of the new rules for entry clearance.
37. At paragraph 46 of the determination, the Judge in fact considered that requiring her to go home would be proportionate in the overall interests of immigration control. He had proper regard to the 2002 Act and in particular the maintenance of effective immigration control which is in the public interest.
38. As to the reliance by Mr Solomon on Zhang, he submitted that the administrative court found that the wording of the immigration rules was in effect ultra vires. That case is not authority for the proposition that the Chikwamba 'principle' is applicable here.
39. Chen supra, also referred to the proportionality of the requirement of temporary separation in order to make an application from abroad. The individual must show relevant evidence that temporary separation will interfere disproportionately with protected rights.

40. Mr Tufan relied on Agyarko and Others, R (on the application of) v SSHD [2015] EWCA Civ 440 (Court of Appeal). There the Court of Appeal, in considering the applicability of Chikwamba stated that it was possible to envisage a Chikwamba type case arising in which Article 8 might require that leave to remain be granted outside the rules, even though it could not be said that there were insurmountable obstacles to the appellant and their spouse or partner continuing their family life overseas. In a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion.
41. Mr Tufan also relied on Singh v SSHD [2015] EWCA Civ 74 (Court of Appeal). There, the Court stated that the Izuazu/Nagre approach had been applied in many cases before the Tribunals. Those are set out and considered from paragraphs 36 onwards. Neither MM (Lebanon) nor Ganesabalan undermines the point made by Sales J in paragraphs 30 of Nagre which, together with his endorsement of the approach in Izuazu, remains good law.
42. In reply, Mr Solomon submitted that the Judge was required to deal properly with the anticipated removal of the appellant to Tanzania. This had not been done.

Assessment

43. I have set out the evidence before the First-tier Tribunal in some detail. I have also referred to the submissions made on behalf of the appellant, including the identification of cases and submissions expressly made by Mr Solomon as set out in his skeleton.
44. In granting permission to appeal to the Upper Tribunal, Judge Kebede found that there was arguable merit in the assertion that the Judge gave inadequate consideration, inter alia, to the appellant's position on return to Tanzania.
45. It is evident from the evidence and submissions before the First-tier Tribunal that she had been residing in Kenya for the past 46 years, together with her late husband. He passed away in July 2011.
46. There was evidence placed before the First-tier Tribunal that the appellant's dependent's pass in Kenya expired in February 2014. The burden was on the appellant to establish her case on the balance of probabilities. She had presented evidence from her son in law in which it was claimed that her pass expired in February 2014 and that as her husband had passed away, she would no longer be able to claim or acquire a dependent's pass. The significance of that evidence was not properly considered by the Judge.
47. I also consider that the Judge's assertion that residence in Kenya for some 46 years must count for a lot [43] was speculative.
48. The Judge was required to consider the appellant's position on the hypothetical basis that she would be returned to Tanzania. No consideration was given to the significant problems that she claimed would result from a removal there. In particular, the finding that there would not be very significant obstacles to her

integration into the country to which she would have to go if required to leave had not been properly considered or assessed. Regard had to be had to her multiple health conditions, her care needs, as well as the fact that she had not lived in Tanzania for over 46 years.

49. I also find that the Judge failed to have proper regard to the significance of decisions including Chikwamba, Hayat and MA (Pakistan), supra.
50. The report of the independent social worker as well as the evidence from her daughter and son in law fully set out her care needs and her current problems.
51. In addition, the evidence as to the asserted inability to obtain adequate care from abroad and the appellant's fears of remaining alone was not properly assessed by the Judge. Evidence relating to the difficulties of obtaining a full time carer or nurse in Kenya was dealt with by the son in law in his evidence. The issue apart from expense was also the difficulty of finding someone reliable and trustworthy to look after a person in the appellant's position. The appellant had also stated that she had been scared of having a live in housemaid at home at night, particularly having regard to the fact that she had been burgled on one occasion when the housemaid had been living there.
52. In the circumstances, I find that the decision of the First-tier Tribunal involved the making of material errors. I accordingly set it aside. The decision will have to be re-made.
53. I have had regard to Mr Solomon's submission that this is an appropriate case to remit to the First-tier Tribunal for a fresh decision to be made. In applying the President's Practice Statement, I find that the appellant has been deprived of the opportunity of having her case properly put and considered by the First-tier Tribunal.
54. The appeal is accordingly remitted to the First-tier Tribunal for a fresh decision to be made. The necessary arrangements will accordingly be made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of material errors on a point of law. The decision is accordingly set aside and will be remitted for a fresh decision to be made by the First-tier Tribunal at Hatton Cross.

No anonymity direction is made.

Signed

Date: 8/8/2015

Deputy Upper Tribunal Judge Mailer