



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27652/2014

THE IMMIGRATION ACTS

Heard at Field House
On 17 December 2015

Decision & Reasons Promulgated
On 5 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Ms MONICA ELAINE SHARP

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Ms Mehtab Malhotra (Counsel), instructed by Chipatiso Associates LLP

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an

appeal by the Secretary of State against a decision of First-tier Tribunal Judge Lingam, promulgated on 4 December 2015, which allowed the Appellant's appeal both under the Immigration Rules and on article 8 ECHR grounds.

Background

3. The Appellant was born on 9 June 1968 and is a national of Jamaica.
4. On 16 June 2014 the Secretary of State refused the Appellant's application for leave to remain in the UK on the basis of her long residence in the UK

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Lingam ("the Judge") allowed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 14 May 2015 Upper Tribunal Judge Warr gave permission to appeal stating inter alia

"The case was heard before the judgements in Singh v Secretary of State [2015] EWCA Civ 74 and Islam v The Secretary of State for the Home Department [2015] EWCA Civ 312. What is said in paragraphs 56 to 57 of Singh & paragraphs 24 to 26 in Islam may have application to this appeal when the date of decision is 16 June 2014."

7. In a decision promulgated on 13 October 2015 the Upper Tribunal set aside the Judge's decision finding that it contained material errors of law. The Upper Tribunal directed that the case should be considered of new at a resumed hearing of the Upper Tribunal.

The Hearing

8. I have the documents which were placed before the First-tier Tribunal, which are the respondent's PF 1 bundle and two bundles for the appellant containing the items listed on the indices to the bundles. In addition the appellant now produces an independent psychiatric report dated 20 November 2015 together with a report from Kings Renal Unit dated 16 September 2015.

9. The appellant gave evidence; she was taken to the terms of her witness statement dated 28th of October 2014, which she adopted as her evidence in chief, before answering a few supplementary questions. The appellant then answered questions in cross examination. No questions were asked in re-examination. Norman Chipatiso gave evidence for the appellant. He adopted the terms of his witness statement dated 28 October 2014 as his evidence in chief before answering questions in cross examination. He was then briefly re-examined. I then heard parties agent submissions.

My Findings of fact

10. The appellant entered the UK 19 July 1998 in possession of a student visa valid until 17 January 1999. When that Visa expired, the appellant stayed in the UK & did not return to Jamaica. The respondent heard nothing further from the appellant until, on 4 April

2011, she applied for leave to remain as an unmarried partner. The respondent refused that application on 1 July 2011. The respondent's refusal did not attract a right of appeal, but the appellant made a number of requests for reconsideration each of which was refused.

11. On 4 April 2014 the appellant was served with a notice of liability to removal and a notice under section 120 of the 2002 Act. On 29 April 2014 representations were submitted on the appellant's behalf seeking leave to remain. The respondent rejected those representations on 16 June 2014. It is against that decision that the respondent appeals.

12. In 2001 the appellant met Norman Chipatiso, a British citizen of Zimbabwean origin. They have been in a relationship since then. Mr Chipatiso has three adult children from a previous relationship. His two oldest children are independent. The youngest child is 19 and is still dependent on him. Mr Chipatiso is employed as a chef. He is a hard-working man with two jobs; he works seven days a week.

13. The appellant has two sisters. One sister lives in the UK, her other sister lives in the USA. The appellant's mother continues to live in Jamaica. The appellant's mother is no longer a young woman and she is assisted in the activities of daily living by the appellant's cousin in Jamaica. The appellant's mother plans to move to the USA to live with the appellant's sister.

14. The appellant suffers from type I diabetes. In 2010 the appellant was diagnosed with renal failure, and in 2011 the appellant was diagnosed with hypertension hyperlipidaemia. The appellant now receives haemodialysis three times a week at the Bromley renal service. Because of her diabetes, the appellant suffers from neuropathy and retinopathy. The appellant now has fistulas in her left arm to assist with haemodialysis.

15. The appellant's partner provides the appellant with significant support. Until recently it was the appellant's partner who took the appellant to hospital for dialysis treatment. Recently the appellant has traveled to and from hospital by ambulance. When the appellant is ill it is the appellant's partner who assists her the ordinary activities of daily living.

Analysis

The Immigration Rules

16. The respondent considered the appellant's application in terms of appendix FM and then moved on to consider the appellant's application under paragraph EX.1. The respondent rejected the appellant's application arguing that no reason has been submitted to demonstrate why the appellant's partner could not accompany the appellant to Jamaica.

17. In R (on the application of Agyarko) [2015] EWCA Civ 440 considered the phrase "*insurmountable obstacles*" as used in paragraph EX.1 of the Rules. "*... The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the European Court of Human Rights regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no*

insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).”

18. At paragraph 26 of that decision “*The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so.*”

19. What is argued for the appellant is that the insurmountable obstacle to return is that she is dependent upon her partner, and her partner is a British citizen with employment and family commitments in the UK which prevent him from going to Jamaica. The problem for the appellant is that the case of Agyarko is directly against her. The circumstances of the appellant and her partner are similar to that of Mr Bennette in the case of Agyarko. It has already been judicially determined that the facts and circumstances pled by the appellant do not amount to insurmountable obstacles. The appellant cannot succeed under paragraph EX.1

20. The real focus in this case (under the immigration rules) is paragraph 276 ADE(vi). The purpose of the resumed hearing was specifically to address the question of whether or not the appellant has lost all ties to Jamaica. In Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC) it was held that the requirement set out in paragraph 276ADE (vi) (in force from 9 July 2012 to 27 July 2014) to show that a person “*is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK*”, requires a rounded assessment as to whether a person's familial ties could result in support to him in the event of his return, an assessment taking into account both subjective and objective considerations and also consideration of what lies within the choice of a claimant to achieve.

21. The evidence indicates that the appellant still has ties to Jamaica. The appellant is a Jamaican national. The appellant’s mother and cousin still live in Jamaica. The appellant spent the first 30 years of her life in Jamaica. Even though the appellant has now been in the UK for 17 years, the harsh truth is that she spent almost 64% of her life in Jamaica and only 36% of her life in the UK. The appellant cannot fulfil the requirements of paragraph 276 ADE(vi) of the rules

ECHR Out-with the Rules.

Article 3

22. In N v UK Application 26565/05 the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non-State body. The European court of Human Rights said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant’s state of origin. The fact that the person’s circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. Those same principles had to

apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost. Notably the court held that no separate issues arose under Article 8(2) in that case and so it was not even necessary to consider the Claimant's submission that would removal would engage her right to respect for private life.

23. In GS (Article 3 - health - exceptionality) India [2011] UKUT 35 (IAC) the Indian claimant suffered from kidney failure and required regular dialysis. Dialysis would cost 10,000 to 12,000 rupees per week in India which the claimant could not afford. It was submitted that the judge had erred in law by holding that the claimant's inability to access available treatment in India met the exceptional test. The Tribunal held that Article 3 does not impose a medical care obligation on the contracting state. The clear result of allowing that claimant to remain in this country would be to impose such an obligation on the United Kingdom.

24. I take full account of the case of GS and EO and GS (India). In reality, a high threshold is set. The appellant requires dialysis three times each week. I do not minimise the impact of her medical conditions, but the argument, in reality, is a comparison of the psychiatric, psychological and support services available to the appellant in Jamaica. The evidence before me makes it quite clear that the quality of such services in the UK is better than the services in Jamaica, but that is not the test for an Article 3 consideration.

25. In Nacic and Others v Sweden (Application no. 16567/10) ECtHR (Fifth Section) 2012 it was held that aliens who were subject to expulsion could not, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that an applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State was not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who was suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal were compelling. (As I have already indicated, in N v UK Application 26565/05 the European court of Human Rights said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin).

26. Whilst I have sympathy for the Appellant, the nature and extent of her conditions do not approach the elevated threshold for engagement of Article 3 of the 1950 Convention.

Article 8 ECHR

27. 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 be 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 is to be deported would be relevant to Article 8 are those where it is an additional factor to be weighed in the balance with other factors that engaged Article 8 (paras 17 – 23). This approach was endorsed by Laws LJ in GS (India) and Others 2015 EWCA Civ 40 (para 86).

28. In Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC) the Tribunal held that (i) MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is a difficulty or inability to access health care in her country of nationality unless, possibly, her private or family life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases; (ii) The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal.

29. In R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

30. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 *"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very*

compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ".

31. Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

32. The respondent's decision places the appellant and her partner in a difficult position. Section 117 the 2002 Act declares that immigration control is in the public interest. The respondent's decision is made to preserve fair and effective immigration control. From the point of view of the appellant and her partner they will have to decide where their future lies. The appellants partner will have to decide if he is able to leave his home, his work and his adult children and follow the appellant to Jamaica.

33. In F & ANR v Secretary of State for the Home Department [2013] EWCA Civ 76 one of the arguments was that the principle in Zambrano applied so far as the Appellant's British citizen husband was concerned. It was held that Zambrano was not applicable to that case as the Claimant's husband was an adult British citizen who would be both entitled and able to remain and to reside in the UK without his wife. He was not dependent upon the Claimant: Zambrano distinguished. It was also said that if that Claimant were to be removed, her husband might follow her to Pakistan if he chose to do so, but his rights in the UK and in the EU were not impaired by her removal (paras 10 - 11)

34. In SS (Congo) and Others [2015] EWCA Civ 387 in relation to one of the appeals, (Richards LJ) the sponsor had arrived in the UK aged 7 from Somalia; he became a British citizen in 2010. He and the Appellant entered the marriage knowing, in effect, she would have to comply with the Immigration Rules. Richards LJ said that the fact that he would lose his job in the United Kingdom if he had to leave to enjoy family life elsewhere and hence would prefer to establish family life here does not constitute compelling circumstances to require the grant of Leave to remain outside the Rules: as the authorities make clear, Article 8 does not create a right for married couples to choose to live in a Contracting State.

35. Because of Section 17B of the 2002 I must give little weight to private life created when the appellant's presence in the UK is unlawful or precarious. For this appellant, private life was established long after her Visa expired. Immigration control is in the public interest. Both the case-law and section 117B of the 2002 Act indicate that that public interest outweighs the interests of the appellant and her partner. I therefore have to find that, in so far as I am able to consider the appellant's article 8 ECHR rights out-with the

immigration rules, the respondent's decision is a proportionate interference with both family and private life.

Decision

35. The appeal is dismissed under the Immigration Rules.
36. The Appeal is dismissed on Article 8 ECHR grounds.

Signed

Date 23 December 2015

Deputy Upper Tribunal Judge Doyle