Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14614/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 October 2018	**On 6 December 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PUNITHAWATHY [S]
[NO ANONYMITY ORDER]

Respondent

Representation:
For the appellant: Mr Andrew McVeety, a Senior Home Office Presenting Officer
For the respondent: Mr Paul Richardson

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision to refuse her further leave to remain on human rights grounds. The appellant is a citizen of New Zealand of Sri Lankan origin and is 74 years old.

Background

2. The claimant came to the United Kingdom as a visitor on 24 March 2012. She overstayed, living with her son and his family. In October 2013 and November 2014, she was refused leave to remain on human rights grounds.

3. On 27 August 2015, she was granted leave to remain outside the Rules until 27 February 2016.

4. On 26 February 2016, the claimant applied for further leave to remain on private life grounds, citing her four-year stay in the United Kingdom and her kidney failure.

5. The Secretary of State considered that the claimant could not succeed under the Rules, and that there were no exceptional circumstances. He noted that the claimant was awaiting a kidney transplant but was satisfied that there were facilities to treat kidney failure and for kidney transplants in New Zealand.

6. The Secretary of State refused to grant further leave to remain.

The 2014 decision

7. The decision of First-tier Judge Bennett on 19 February 2014 forms the *Devaseelan* starting point for the 2018 decision. He found that the claimant had discovered that she had kidney failure in the United Kingdom, three months after her arrival: before that she only had high blood pressure. Her first dialysis was in July 2012.

8. Her son in New Zealand, who had been supporting her there before she came on her United Kingdom visit, was contemplating relocating to Australia but no visas had yet been obtained. She did not know whether he would obtain a visa for her also.

9. Evidence was received from the claimant's son in the United Kingdom (he was tendered, but not cross-examined), and from her brother, who told the Tribunal that the claimant, like himself, had a hereditary kidney disease and his doctor brother had told him that it was never predictable when it would occur. His sister had become ill suddenly after her arrival in the United Kingdom.

10. The Secretary of State told the Tribunal that the claimant would not be removed if she was medically unfit to travel, and if she was suffering from kidney failure, unless there was a change in circumstances. The claimant accepted that there would be no prejudice to her to remain in the United Kingdom on that basis.

11. The Judge found that the claimant was not a medical tourist: treatment was available in New Zealand at public expense, and was of similar quality. He accepted that the claimant had established family life with her son in the United Kingdom and was being supported by him, with helpful rom her two

other sons in the United Kingdom and her brothers. The majority of her family was here, but her ties with them were private life only, save in relation to the son with whom she was living.

12. The First-tier Judge dismissed the appeal, considering that to be a proportionate interference with her family and private life: it was a factor in that decision that the Secretary of State's case was that the claimant would not be removed if she was unfit to travel.

The 2018 decision

13. The First-tier Judge in 2018 heard oral evidence from the claimant's son, but the claimant herself did not attend the hearing, due to her health problems. The Judge set out the medical evidence: the claimant now has 22 ailments, the most serious of which are stage 5 (end-stage) kidney disease, anterior falx meningioma (a type of brain tumour which can cause personality change including mimicking depression, headache, vision problems and arm or leg weakness, loss of sense of smell), osteoarthritis and hypertension.

14. The First-tier Judge at [17] took account of the evidence from the claimant's consultant nephrologist at Imperial College Healthcare in June 2014, directed to an airline for which she had to cancel a flight ticket:

> "[The claimant] is now suffering from peripheral neuropathy and is generally weak and fatigued. These are medical problems which we are working through. She could not have anticipated these arising at the time a flight was booked for holiday back to her homeland. I am afraid she is not medically fit for travel and I would endorse the family's request that she has a refund in full."

15. At [11] the Judge recorded the opinion of the claimant's general medical practitioner: the claimant was that:

> "[The claimant is] very frail – indicative by a high Rockwood Frailty Score
>
> As a result of her multiple problems, her exercise tolerance is very reduced. In addition, her mobility is affected by severe pain in both legs, both knees and her left shoulder. She also has had a left tibia plateau fracture. She is very slow when walking and her gait is compromised.
>
> Her main overwhelming problem however is her very poor renal function – she has end-stage renal failure – she currently requires dialysis three times a week. Her clinical conditions are such that she gets exhausted so badly that she cannot take part in any activities that evening and the following morning.
>
> This means that she gets very weak and mobility is a problem as a result. Interruptions to effective dialysis can have serious consequences. She is not a candidate for renal transplantation so she is at maximal therapy for her renal failure."

The evidence of the claimant's son was that even walking to an ambulance, his mother needed support and he could not 'even imagine taking her on a flight'.

16. The Judge recognised that the 2014 decision was the *Devaseelan* starting point in this appeal and adopted the finding of the previous Judge that the claimant has family life with her son and her United Kingdom based family members, who were helping to provide physical care for her. However, the claimant's cohabitation with her son and his family was of recent origin (6 years) and prior to that there had been lengthy geographical separation, with the claimant being supported by her son, then in New Zealand, who was now living in Australia. It is not suggested that the claimant has, or could obtain, a visa to go and live with him in Australia.

17. The First-tier Judge found that if the claimant travelled back to New Zealand, she would do so via Sri Lanka and with the support of her son, 'and she has the prospect of at least palliative medical care to alleviate, so far as possible, any suffering during the period leading up to her death'. The *D/N* 'deathbed test' was not met and Article 3 ECHR did not avail her.

18. The Judge considered that the Article 3 ECHR standard was not met but that the claimant's removal would breach her private life rights under Article 8 ECHR. The Judge allowed the appeal under Article 8 ECHR on private life grounds, finding that it would be unduly harsh to remove her to require her to undertake the journey to New Zealand. It was the removal itself that was the determining factor. The Judge made no reference to Part VA of the Nationality, Immigration and Asylum Act 2002 (as amended) and the statutory presumptions therein, being concerned principally with family life.

19. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

20. The Secretary of State contended that it was not open to the Judge to give the weight he did to the general medical practitioner evidence as to the claimant's mobility problems and that 'the Judge has failed to give any adequate reasons to enable the Secretary of State to establishment why the objective specialist evidence did not mitigate any claimed detrimental impact (as it has not been set out what would be the effect on the [claimant]').

21. The third ground is that the Judge has essentially allowed the appeal under Article 8 ECHR on the same facts which failed under Article 3 ECHR. The Secretary of State noted that following *MM (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 279 it was possible for an appeal to be allowed under Article 8 ECHR if there were something other than the facts of the Article 3 claim, but contended that the First-tier Judge had failed to identify any additional factor of the *MM (Zimbabwe)* type.

22. Permission to appeal was granted on the basis that the First-tier Judge's finding at [13] that there would be no very significant obstacles to reintegration in New Zealand was arguably inconsistent with the finding at [30] that it would be unduly harsh to return her there. All the grounds of appeal were considered arguable.

Rule 24 Reply

23. There was no Rule 24 Reply on behalf of the claimant.

24. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

25. At the Upper Tribunal hearing, Mr McVeety for the Secretary of State accepted that there was risk to the claimant from such a lengthy journey. The Secretary of State had hoped that if the claimant had dialysis immediately before embarking, she would be able to last until Sri Lanka or New Zealand were reached and then have dialysis immediately on arrival. Mr McVeety argued that at [29], the decision of the Upper Tribunal in *Okonkwo* (legacy/*Hakemi*; health claim) Nigeria [2013] UKUT 401 (IAC) had been misapplied.

26. Mr McVeety said that people did fly with end-stage renal failure and that the Secretary of State had produced medical evidence to that effect. He did not suggest that the claimant's other ailments, including her mobility issues, had been taken into account in that evidence.

27. For the claimant, Mr Richardson relied on the letter from the claimant's general medical practitioner and the large number of co-morbidities the claimant had, including end-stage renal failure and a brain tumour. The claimant would need to break her journey because of her extreme frailty. He accepted that healthcare in New Zealand was adequate: the risk was in the journey there, and the emotional impact of separation from her family, with whom the claimant had lived for the last 6 years. Whilst this appeal might not reach the *D/N* 'deathbed' standard, it was very close to that standard and if the Upper Tribunal had been able to apply the *Paposhvili* extension, might well have succeeded under that more relaxed test.

28. Mr Richardson noted that as long ago as 2014, the claimant (whose medical conditions were then less serious) was considered unable to travel and that a period of discretionary leave had then been granted on health grounds. There had been no positive change in the claimant's health since then: instead, it had significantly deteriorated.

29. The First-tier Judge had considered all relevant authorities and the economic needs of the United Kingdom, before concluding that there were compelling circumstances and/or that it would be unduly harsh to return the claimant to New Zealand, with the journey being physically nearly impossible, a revived family life of 6 years' standing with her son who lives here.

Analysis

30. This appeal sounds only in human rights outside the Immigration Rules HC 395 (as amended). The latest assessment of the difficulties caused by the *Paposhvili* extension is that of the Court of Appeal in *MM (Malawi) & Anor v the Secretary of State for the Home Department* [2018] EWCA Civ 2482. However, the First-tier Tribunal did not have the benefit of the reasoning in that decision.

31. I bear in mind that as long ago as 2014, the Secretary of State accepted that the claimant, who was not then as ill as she now is, could not in practice be removed, and granted discretionary leave on that basis. It is not clear to me that anything has changed for the better in the claimant's health circumstances since then: instead, it seems she is much worse.

32. There is also the question of this claimant's brain tumour, about which there was little detailed evidence before the First-tier Judge, her age, and all of the other ailments, including her very limited mobility and the extreme exhaustion which follows her dialysis treatments.

33. The journey to New Zealand is particularly long, involving several long-haul flights over a period of 2 days or more, around which it would be difficult to organise dialysis. An attempt to travel had to be cancelled in 2014 because she was 'suffering from peripheral neuropathy and is generally weak and fatigued'. The medical evidence before the First-tier Tribunal was that the claimant was worse than that now, that in fact she was dying from kidney failure and if dialysis were not available three times a week, might do so rapidly. She is not considered to be suitable for a kidney transplant, so dialysis is the only treatment available for her now.

34. It was the journey which concerned the First-tier Judge. The weight to be given to medical evidence is always a matter for the fact-finding Tribunal and the grounds of appeal are, to that extent, merely a disagreement as to the weight to be placed thereon.

35. I have considered the guidance given by the Upper Tribunal in *Okonkwo* but it significantly pre-dates the *Paposhvili* recalibration and the decision of the Court of Appeal in *MM.* I do not think that there is much assistance to be gained from *Okonkwo,* where there was considerably less equivalence in treatment between the host country and the country of origin. It is not disputed that if the claimant can reach New Zealand safely, she would have treatment there and presumably also some social services support during her last few weeks or months of life.

36. The suggestion that the 'very significant obstacles to reintegration' test is equivalent to that of 'undue harshness' in return is erroneous. The two tests are different and the Judge was entitled to make the findings he did about the claimant's circumstances under each test.

37. In the final analysis, the question is whether he was also entitled to decide that this claimant could not lawfully be removed by such a long journey. It may be a generous decision, but I am, just, satisfied that such a conclusion was open to the Judge and that the advanced frailty recorded in the general medical practitioner's letter was sufficient, taken with the family life she has in the United Kingdom, to engage Article 8 ECHR and enable her to succeed on that basis.

38. The Secretary of State's appeal is therefore dismissed and the decision of the First-tier Tribunal stands.

DECISION

39. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law
I do not set aside the decision of the First-tier Tribunal but order that it shall stand.

Date: 30 November 2018 Signed Judith AJC Gleeson Upper
Tribunal Judge Gleeson