



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/01418/2020

THE IMMIGRATION ACTS

**Heard at Field House (via Skype)
On 20 November 2020**

**Decision & Reasons Promulgated
On 08 December 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

**FLORENCE [O]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mian, instructed by Mondair Solicitors

For the Respondent: Mr Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Kenyan national who was born on 20 May 1969. She appeals, with permission granted by Judge Scott Baker, against a decision which was issued by Judge Barker (“the judge”) on 17 March 2020. By that decision, the judge dismissed the appellant’s appeal against the respondent’s refusal of her human rights claim.

Background

2. The appellant arrived in the United Kingdom in January 2003. She held entry clearance as a work permit holder until 31 August 2004. She sought leave to remain as a student before the expiry of her leave to enter but

that application was refused in 2004 and the decision was maintained on reconsideration. There was no right of appeal. The appellant decided to overstay. A decade or so later, the respondent issued her with a notice as an overstayer. This prompted her to make an application to regularise her position in October 2015. That was refused but the decision attracted no right of appeal. In February 2016, she made a further application, which was refused in May 2016, this time with an in-country right of appeal.

3. The appellant appealed against this refusal. Her appeal was heard by Judge Asjad, sitting in Birmingham, on 14 June 2019. Judge Asjad heard evidence from the appellant and her partner, Mr H, and submissions from the representatives on each side. It was contended, in substance, that the appellant enjoyed a family life with Mr H and that there were insurmountable obstacles to that relationship continuing in Kenya. It was submitted that Mr H's mental health had been poor for many years, largely due to violent and sexual abuse he had suffered as a child.
4. Judge Asjad accepted that the appellant and Mr H were in a committed relationship. She reviewed the medical evidence with some care and although she accepted what she had been told about Mr H's past, she did not consider that his mental health condition was particularly severe, or that he would be unable to access appropriate treatment in Kenya. Nor did she consider there to be any reasons disclosed by the appellant herself which would prevent the couple living together in her country of nationality. Having considered the provisions of s117B of the Nationality, Immigration and Asylum Act 2002, Judge Asjad concluded that the public interest outweighed the Article 8 rights at issue and dismissed the appeal.
5. The appellant sought permission to appeal against Judge Asjad's decision, but permission was refused by the FtT (Judge Martins) and the Upper Tribunal (Judge McWilliam). The appellant became appeal rights exhausted in March 2018. Efforts to have the underlying decision reconsidered failed in 2018 and, on 10 April 2019, the appellant made further submissions under paragraph 353 of the Immigration Rules. She relied, as she had before Judge Asjad, on her relationship with Mr H and the central submission that his condition had deteriorated to the point that he could not live with her in Kenya. The respondent was not persuaded. The appellant appealed again.
6. Judge Barker concluded that Mr H's condition had not reached the point at which family life could not continue in Kenya. The central question before me is whether that conclusion is vitiated by legal error. For the reasons which follow, I have come to the clear conclusion that it is, and that the decision of the FtT falls to be set aside. In order to explain that conclusion, it is necessary to examine the decision reached by the judge in some detail.

The Decision of the First-tier Tribunal

7. At [2], the judge described the appellant's immigration history. At [3]-[16], she set out relevant legal principles from statute and authority. At [17]-[20], she listed the documentary and oral evidence before her. At

[21], she set out the judicial headnote from Budathoki [2014] UKUT 341 (IAC), so as to frame the task she was to undertake in the remainder of the decision. At [24], the judge listed the agreed facts about the appellant and her relationship with Mr H and the extent to which it was agreed that the requirements of the Immigration Rules were met. At [25], she stated that the remaining issues centred on paragraph EX1 of Appendix FM and paragraph 276ADE(1)(vi) of the Immigration Rules and whether there was a proper claim for leave outside the Immigration Rules with reference to Article 8 ECHR.

8. At [26]-[34], the judge mentioned a number of further authorities which related to her assessment of the evidence and to credibility in particular. She recalled the guidance given in Tanveer Ahmed [2002] Imm AR 318 and Devaseelan [2003] Imm AR 1. At [33]-[34], she mentioned Article 4 of the Qualification Directive and KB & AH (Pakistan) [2017] UKUT 491 (IAC) (neither of which were relevant in this non-protection context). At [35], the judge found that Article 8 was engaged in its family life aspect between the appellant and Mr H, and that the respondent's decision represented a 'significant interference' with that protected right.
9. At [36]-[59], the judge turned to the main question in the appeal: paragraph EX1 of Appendix FM. She recalled that there was a genuine and subsisting relationship but that the respondent did not accept there to be insurmountable obstacles to its continuation in Kenya: [36]-[38]. For the appellant, it was submitted that there had been a significant deterioration in Mr H's condition. For the respondent, it was submitted that nothing had changed since Judge Asjad's decision and that her decision should be regarded as determinative.
10. The judge noted that the appellant was a qualified teacher who had spent much of her life in Kenya and that she was familiar with the culture: [43]. In the following paragraph, she noted that the crux of the case was the appellant's contention that Mr H required her full time care and that she would not be able to work and care for him in Kenya. She had no property in Kenya and no family who could offer support. Nor would he be able to receive free medical care there. At [47], the judge said this:

"It is a compelling argument that the Mr [H] would lose his right, as a British citizen to free health services, if he were to follow the appellant to Kenya, but I remind myself that whether he does that would be his choice. I am also conscious of the fact that the appellant can return to Kenya alone and apply for entry clearance to return as a spouse in the normal way."
11. The judge then analysed the medical evidence before her. She noted that there was a report from a Consultant Psychiatrist, Dr Singh. She considered that report - dated 14 September 2018 - to paint a different picture to that claimed by the appellant and her husband. She was also concerned by the age of the report and the fact that it was based on a single meeting: [48]. Dr Singh had stated that Mr H suffered from a moderate depressive disorder and from 'fleeting thoughts of suicide but denies any active intent or plans'. This contrasted, the judge held, with

the account given by the appellant and her partner, in which they described suicide attempts, one of which pre-dated the meeting with Dr Singh: [49]. The judge did not go behind the assessment of Judge Asjad, which was that Mr H had mental health problems as a result of his abusive childhood, but she considered the extent of the illness to be an important factor in her deliberations.

12. The judge was aware that there might be innocent reasons why differing accounts emerged from the report of Dr Singh and the witness statements but she felt that the purpose of Dr Singh's assessment would have been clear and that 'there has been a significant history of immigration applications': [51]. Whilst the judge accepted Dr Singh's analysis that it would be difficult and stressful for Mr H if the appellant was removed, she did not accept that the difficulty crossed the threshold into paragraph EX1: [52].
13. Mr H told the judge that he did not agree with Dr Singh's analysis. Mr Mian suggested that the GP was better placed to make an assessment but that the judge should nevertheless bear Dr Singh's opinion in mind insofar as it bore on the consequences of separating the appellant from Mr H. The judge stated, understandably, that she struggled 'with the implication that I should attach more weight to some parts of Dr Singh's report than other parts.': [54].
14. The judge held that the evidence given by the appellant and her husband was contradictory and inconsistent. The GP stated in a letter which was nearly three months old that Mr H suffered from 'considerable depression and anxiety' with 'daily panic attacks'. The GP also stated in his letter that Mr H's mood was 'not controlled', whereas Mr H had told the judge that his medication had stabilised and that it worked 'to a degree': [54]-[55]. Mr Mian had referred to other documents but they pre-dated the GP's letter and added nothing. The GP may have a deeper knowledge of Mr H but Dr Singh was an expert in his field: [56]. At [57]-[58], the judge drew her analysis together with the following conclusions:

"[57] In my judgment, given that the appellant's husband has currently stabilised his condition with medication that he can obtain in Kenya if he chooses to move with the appellant, and that there is no evidence that counselling of the type he is currently waiting for cannot be provided in Kenya, I am not satisfied that there are insurmountable obstacles to the appellant's reintegration in Kenya. The appellant will be able to provide support to her husband through modern technology if he chooses to remain in the United Kingdom, or in person if he chooses to go with her. In any event, he will be able to continue with medical treatment and engage counselling services as planned.

[58] I see no reason to go behind the decision of Immigration Judge Asjad, and do not find that Mr Hartwell's mental health has deteriorated significantly since then."

15. The judge then considered paragraph 276ADE(1)(vi) of the Immigration Rules (very significant obstacles to re-integration). She noted that her earlier findings were equally relevant to this part of her decision. She

acknowledged that there might be some initial hardship on return but she considered the appellant to be well qualified and able to obtain employment despite her lengthy absence: [62]. She did not find that Mr H's condition had deteriorated significantly since Judge Asjad's decision. She noted the conclusion of the FtT (SEC), that Mr H was entitled to Personal Independent Payment by reasons of his mental health issues but he could remain in the UK and would receive adequate support in the appellant's absence: [63].

16. The judge's analysis of Article 8 ECHR appears at [65]-[72] of her decision. Although Article 8 ECHR was engaged, the judge considered there to be matters which weighed against the appellant in the balancing exercise. It was significant that 'the evidential requirements of the Immigration Rules are not satisfied': [67]. The appellant was not financially independent although she did speak English. Her immigration status had been precarious since 2004 and she attached little weight to her private life and the relationship formed with the sponsor. Since the relationship had been in place for seven years, however, the judge did attach some weight to it: [70]. At [71], the judge stated that Chikwamba v SSHD [2008] 1 WLR 1420 was of no application because there were no children involved. She did not accept that any separation of appellant from husband, temporary or otherwise, would be disproportionate. Having considered the case as a whole, the judge considered the interference proposed by the respondent to be a proportionate one: [72]-[74].

The Appeal to the Upper Tribunal

17. The grounds of appeal are lengthy and discursive. It was so difficult to discern the legal errors asserted by the author of the grounds that I asked Mr Mian, at the outset of his submissions, to provide me with a concise statement of the grounds of appeal. He was unable to do so, whether at the outset of his submissions or at all. He made extensive reference to the judge failing to attach the correct weight to various pieces of evidence and he asserted throughout that the judge should have made certain findings. When I observed that these were merely disagreements with the findings reached, he seemed unable to express his arguments in a way which asserted any legal error on the part of the judge. Drawing together the grounds of appeal and the oral submissions he made, however, it seems that the challenges he sought to advance were as follows:
- (i) In doubting that the sponsor's mental health had deteriorated to the extent claimed, the judge failed to take account of relevant material in the form of a Community Mental Health Assessment ("CMHA") dated 1 August 2018.
 - (ii) In concluding that there were inconsistencies in the account of the sponsor's mental health, the judge failed to put matters of concern to the appellant or the sponsor, thereby falling into procedural error.
 - (iii) The treatment of the GP's letter was irrational in all the circumstances. The only rational conclusion - on the totality of the

evidence, including the FtT(SEC)'s decision - was that the sponsor's condition had deteriorated.

- (iv) The judge had failed to consider whether the sponsor would actually be able to receive adequate treatment and support in Kenya, given what was said about the cost of such treatment.
 - (v) The judge had failed to consider other relevant matters when assessing whether the sponsor could relocate to Kenya, including the support and stability available in the UK.
 - (vi) The judge had misdirected herself in law in relying throughout the decision on the ability of the sponsor to choose whether he accompanied the appellant to Kenya; that was not the question posed by EX1 or Article 8 ECHR.
 - (vii) The judge misdirected herself in law in distinguishing Chikwamba [2008] 1 WLR 1420 on the sole basis that there were no children involved.
18. Mr Tufan submitted that the judge's decision was properly open to her and that it contained no legal error. He accepted that the judge had not referred in terms to the CMHA but it had plainly been in mind when she concluded at [56] that the other medical reports added nothing to the assessments undertaken by the GP and Dr Singh. Nothing more was required. The judge had reached a sustainable conclusion regarding the claimed deterioration in Mr H's mental health. It had not been incumbent on the judge to put matters of concern to the appellant or her husband; these were obvious matters of contradiction and it was for the appellant to deal with them. The judge's treatment of the GP's letter was adequate in all the circumstances. The letter was brief and the substance of it had been taken fully into account by the judge. It was relevant to note that the GP's letter contained entirely self-reported symptoms and was deserving of little weight for that reason: JL (China) [2013] UKUT 145 (IAC) refers.
19. The decision of the FtT(SEC) was not binding and it was not clear whether Mr H had, in truth, been entitled to PIP all along; the fact that his entitlement had been accepted by the FtT(SEC) did not mean that there had been a change in his condition. There had been no documentary evidence to show that there would be a cost for Mr H's treatment in Kenya and, in any event, it was perfectly reasonable for the judge to conclude that she would be able to find work as a teacher and support them both. Ultimately, as the judge found, the appellant and the sponsor had a choice to make and the facts of this case came nowhere near the very serious hardship required by EX2. GM (Sri Lanka) [2019] EWCA Civ 1630 was distinguishable on its facts as there are no children in the instant appeal and the test was whether there were insurmountable obstacles to the continuation of family life in Kenya. It was imperative to recall what had been said in Kaur [2018] EWCA Civ 1423 about Chikwamba and Agyarko [2017] 1 WLR 823: if the appellant was certain to be granted entry clearance upon return, that *might* reduce the weight ordinarily attached to

immigration control. There had been insufficient evidence before the judge to show that there were other material matters which were relevant to the assessment of paragraph EX1.

20. Mr Mian replied. He continued to rely on the submission that the matters at [48]-[51] of the judge's decision should have been put to the appellant and the sponsor. It was not correct to characterise the GP's letter as one which was based entirely on self-reported symptoms with no analysis of the same. The GP had prescribed very high levels of medication, which illustrated his analysis of the claims made by Mr H. It was clear that the sponsor had not received PIP before the FtT(SEC)'s decision and that he had not made a previous application for it. It was relevant to recall that the sponsor could not receive PIP or NHS treatment if he was not in the UK. There was no documentary evidence of what was available in Kenya but it was necessary to consider what the appellant had said about it. The judge had erred in relying on choice. GM (Sri Lanka) was of general application. In relation to Chikwamba and Younas [2020] UKUT 129 (IAC), it was necessary to consider that the sponsor suffered from significant mental health problems.
21. In terms of relief, Mr Mian submitted that the evidence was clear and that the appeal fell to be allowed without more. I reserved my decision.

Analysis

22. I am satisfied that the judge misdirected herself in law in two respects. Firstly, in stating at [47] and [57] that the sponsor had a choice over whether he could join the appellant in Kenya, the judge corrupted her assessment of paragraph EX1 of Appendix FM with a legally irrelevant consideration. That paragraph, read alongside EX2, requires a decision maker to consider whether it would cause very serious hardship for an applicant or their sponsor to continue their family life outside the UK. The assessment which is required is a hypothetical one - of placing the couple in the country in question and considering whether the obstacles they would face there can properly be described as insurmountable. It is no answer to that question that one party might choose to undertake that journey or to remain in the United Kingdom. That clarification was provided in authorities concerned with EX1(a) (qualifying children)¹ but the same hypothetical analysis must necessarily apply in a case concerned with the partner's relocation under EX1(b).
23. Secondly, the judge misdirected herself in law in her approach to Chikwamba. The absence of children was insufficient to disapply the principle in that case, which was most succinctly stated by Lord Reed at [51] of Agyarko:

"If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

¹ SSHD v AB & AO [2019] EWCA Civ 661; [2019] 1 WLR 4541, for example.

24. The application of that principle is not dependent upon the presence or absence of children, albeit that it might be easier in a case involving children to show that it is not proportionate to expect an individual to return to apply for entry clearance.
25. Ultimately, however, these legal misdirections come to nought if the findings of fact made by the judge provide a sound basis, on a proper application of the law, to dispose of the appeal. Despite the determined submissions made by Mr Tufan in defence of the judge's decision, I am satisfied that she fell into error in her consideration of whether there exist insurmountable obstacles to family life continuing in Kenya. In addition to the error I have identified at [18] above, it is quite clear that the judge left material matters out of account in her analysis of that question. She did not consider whether the withdrawal of the Personal Independence Payment as a result of leaving the United Kingdom would lead to very serious hardship. Nor did she consider – in a case in which it was accepted that the sponsor is in need of medication and counselling on the NHS – whether he would be able *in reality* to afford, and therefore to receive, similarly effective treatment in Kenya. Rather than answering that question squarely, the judge resorted to a conclusion that the sponsor could choose whether or not to relocate.
26. There are also difficulties with the judge's assessment of the extent of Mr H's mental health problems, although I reject a number of the criticisms advanced by Mr Mian. It is not correct as a matter of law to state that it was incumbent on the judge to forewarn the appellant and the sponsor regarding her concerns about the consistency of their evidence with the report of Dr Singh. Dr Singh made no reference to actual suicide attempts, whereas their statements did. This was the sort of obvious contradiction considered in cases such as Maheshwaran [2002] EWCA Civ 173 and WN (DRC) [2004] UKIAT 213. As Ouseley J explained at [28] of the latter decision, an applicant is not entitled to regard such a point as uncontroversial merely because it has not been raised by the judge; it is for the represented applicant to grapple with such points and a failure to do so risks the judge attaching significance to the contradiction. Nor do I accept that the judge's conclusions on the medical evidence were tainted by irrationality.
27. What is unfortunately clear, however, is that the judge erred in failing to take account of material evidence in reaching the conclusion that the sponsor's mental health problems were not as serious as he and the appellant claimed. The hearing took place in March 2020 and it was an odd feature of this case that much of the mental health evidence was rather older than that. What was not that old, however, was the decision of the First-tier Tribunal (Social Entitlement Chamber). That decision was reached on 16 December 2019. The FtT's conclusion was that the sponsor was entitled to the daily living component of Personal Independence Payment at the standard rate because he had difficulties in five areas: preparing food, managing therapy or monitoring a health condition, washing and bathing, dressing and undressing and engaging with other people face to face. The reasons for that conclusion were as follows:

“By reason of mental health issues Mr [H] is significantly limited, in particular in the activities detailed above. As a result, Mr [H] qualifies for the above award of Personal Independence Payment. In reaching its decision the Tribunal placed particular reliance upon our assessment of all the evidence available to use today. The Tribunal was satisfied that the case could be dealt with fairly and justly in the absence of the appellant who had elected not to attend an oral hearing.”

28. The judge did not make reference to this award in her assessment of whether paragraph EX1 applied. She only turned to it in her assessment of the separate question posed by paragraph 276ADE(1)(vi). It was certainly a relevant matter for her to consider in assessing whether there were insurmountable obstacles to family life continuing in Kenya, however, and to whether or not there had been a significant deterioration in Mr H’s mental health. Mr H did not receive PIP before this decision. His application for it had been refused by the Secretary of State for Work and Pensions in December 2018 and it was only in December 2019 that that decision was set aside by the FtT. The fact that the Tribunal reached that conclusion and that the sponsor then started to receive PIP must, to my mind, provide some indication that there had been a decline in his mental health since the decision of Judge Asjad. In failing to consider it as part of her analysis of that contention, I am satisfied that the judge fell into further legal error.
29. The judge also erred in failing to make anything other than a passing reference to the Community Mental Health Assessment which appeared at pp44-48 of the appellant’s bundle. Again, this was a surprisingly old document (having been printed on 1 August 2018) but the judge was not entitled to discount it in the manner she did at [56]. The CMHA was compiled by a Nurse called Korleki Henson and provided important evidence regarding the sponsor’s mental health in the period following Judge Asjad’s decision. The report suggested that he had attempted to take overdoses on a number of occasions; that he had made preparations to take an overdose of paracetamol shortly before the report; and that the appellant was sufficiently concerned about his suicidal ideation that she had removed all knives from the house. Insofar as the judge seized upon the difference between the report of Dr Singh and the evidence given by the appellant and his wife, the CMHA provided relevant evidence which tended to suggest (I put it no higher than that) that the sponsor had stated to other healthcare professionals that he had rather more than the ‘fleeting’ thoughts of suicide described in Dr Singh’s report.
30. I consider the judge to have fallen into further legal error in failing to consider the GP records which appear at the very end of the appellant’s bundle before the FtT. Whilst she was obviously entitled to view the short and largely unreasoned letter from the GP with a degree of circumspection, the context in which that letter was to be assessed was provided by the GP records which appear at pp222-235. Those records extended to 29 January 2020 and showed relatively regular trips to the GP practice, during which mental health issues were clearly to the fore. The

final entry – dated 22 January 2020, for example, recorded that the sponsor was being ‘eaten alive’ by anxiety surrounding the appellant’s immigration status; that he had been experiencing suicidal thoughts; and that he had burned himself intentionally. The previous month, December 2019, shows the sponsor claiming that his mood had ‘dipped’ and that he was trying and failing to secure counselling services which would assist. At the start of 2019, there is a record showing that his dose of mental health medication had been increased and that he was feeling better but that he still had ‘bad days and panic attacks’. Again, whilst this material was not determinative of the question which concerned the judge (of whether the appellant and the sponsor were simply manufacturing the deterioration in his mental health to bolster their case), it was certainly relevant material for the judge to take into account in answering that question. She failed to take it into account, properly or at all.

31. Ultimately, therefore, I am not satisfied that the judge conducted a lawful assessment of whether there are insurmountable obstacles to the continuation of family life in Kenya. In concluding, at [58], that Judge Asjad’s finding on that issue should stand, the judge misdirected herself in law and failed to take relevant evidence into account. That central question in the appeal must be re-examined.
32. I am not content to proceed in the manner suggested by Mr Mian and simply to remake the decision on the evidence which is presently before me. Much of that evidence was old when the FtT considered it and it is certainly too old now. Whilst I am acutely conscious of the assertion that the ongoing uncertainty surrounding the appellant’s immigration status is worsening the sponsor’s mental health, the fact is that I do not have the up-to-date evidence which is required to establish that there are insurmountable obstacles to the continuation of family life in Kenya. More up-to-date evidence is necessarily required on the subject. That evidence must, at the very least, encompass a recent assessment of the sponsor’s mental health, together with details of his medication regime and other treatment and documentary evidence concerning the availability of that treatment in Kenya.
33. Although I have reflected carefully on Mr Mian’s submission that there is, in reality, only one proper answer in this case, I do not consider him to be correct in that submission. Whilst it seems likely that the sponsor continues to be significantly mentally unwell due to the frankly horrific experiences he endured as a child, the extent of his mental health problems and the treatment he requires for those problems remain live issues in respect of which there must be a proper and lawful assessment. Nor, for the reasons given by Mr Tufan, do I consider this to be necessarily a case in which the Chikwamba principle entitles the appellant to succeed. Assuming that the sponsor remains in receipt of PIP, it seems certain that the appellant would be granted entry clearance as a spouse upon making such an application. But that does not necessarily remove the public interest in her taking that course. She has overstayed for significantly more than a decade and may not meet the in-country Immigration Rules. I cannot exclude the possibility that a judge who finds that she does not

meet those Rules could properly conclude that she must return to Kenya to make an application for entry clearance.

34. In all the circumstances, therefore, I conclude that the decision of the FtT is vitiated by legal error and that it must be set aside in full. The appropriate course – given the scope of the enquiry which is required – is for the appeal to be remitted to be heard afresh in the FtT by a judge other than Judge Barker.

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed. The decision of the FtT is set aside and the appeal is remitted to the FtT to be heard afresh.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

05 January 2021