



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/15514/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Field House *via Skype for Business*  
On 4 May 2021

Decision & Reasons Promulgated  
On 24 May 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

OM  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms. J White, Solicitor, Kesar & Co Solicitors

For the Respondent: Ms. S Cunha, Senior Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. I observe the confirmation in the reported decision of *Mx M (gender identity - HI (Iran) - terminology) El Salvador* [2020] UKUT 00313 (IAC) that decision makers should where possible apply the guidance in the Equal Treatment Bench Book and use gender terminology which respects the chosen identity of appellants before them. Such approach can properly be adopted in respect of witnesses.

2. The appellant is a national of the United States of America. Her appeal against the decision of the respondent to grant her leave to remain in this country on human rights (article 8) grounds was initially refused by the First-tier Tribunal (JFtT Hone) sitting at Taylor House by a decision sent to the parties on 6 May 2020.
3. The appellant was granted permission to appeal to this Tribunal by UTJ Mandalia and by a decision sent to the parties on 18 December 2020 I set aside the decision of the First-tier Tribunal.
4. I directed that the decision be remade by this Tribunal and confirmed that the findings of fact made by Judge Hone at para. 17 were preserved. This paragraph details:

‘17. I find the Appellant and her partner are very credible and that they are in a loving and supportive relationship. I find that their account is credible. I find that the Appellant’s partner is undergoing gender reassignment therapy and will imminently have bottom surgery. It is accepted and I find that he has already had top surgery. I also find that he identifies as a man and has since 2013. I find that the Appellant supports her partner. Her partner is also supported by his mother and his family.’

### **Remote Hearing**

5. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

### **Anonymity**

6. By means of my decision dated 18 December 2020 I issued an anonymity order. Neither party applied for it to be set aside and I confirm it at the conclusion of this decision.

### **Facts**

7. The appellant is a national of the United States of America. She entered this country as a Tier 4 (General) Student in 2014 and studied at a university in this country. Whilst at university she met her partner, ‘AA’, a British citizen who was born female and at the time they met identified as male. He continues to do so. AA underwent psychological assessment and began the processes of medical transitioning in 2011. He has engaged in hormone replacement therapy (testosterone) administered by intramuscular injection since 2013 and attends a clinic for his required injections on

average every 12 weeks. This requires him to undergo quarterly blood tests to identify hormone levels. Such treatment will be undertaken throughout his lifetime.

8. AA completed chest reconstruction surgery in 2014 and is currently referred for both hysterectomy and genital reconstructive surgery. There continues to be a long waiting time for such surgery and once undertaken substantial recovery time is required. To date, as a British citizen, the cost of his surgery has been covered by the National Health Service, and this will be the position for future treatment in this country. He pays £10 per prescription in respect of each individual treatment of hormone replacement therapy.
9. The appellant returned to the United States of America at the conclusion of her studies and the couple's relationship continued on a long-distance basis. The couple relocated together to the Republic of Ireland in 2016. They resided there until 2017 when they relocated to the United Kingdom. Whilst living in the Republic of Ireland, AA regularly returned to the United Kingdom as required to receive his hormone replacement therapy.
10. The appellant entered this country with entry clearance as a Tier 4 (General) Student in September 2017 enjoying leave to enter until January 2020. Her leave was curtailed in November 2018 upon her course being reduced from 2 years' study to 1 year, such leave being valid until 4 March 2019.
11. On 18 February 2019 the appellant applied for leave to remain on human rights (article 8) grounds. The respondent refused the application by a decision dated 2 September 2019. The respondent did not challenge AA's gender identity, nor the genuineness of the relationship. By means of her decision she concluded that there were no insurmountable obstacles to family life continuing outside the United Kingdom, namely in the United States.
12. Both the appellant and her partner are employed. The appellant is permitted to work consequent to her enjoying 'section 3C leave': section 3C of the Immigration Act 1971.

### **Evidence**

13. The appellant was unrepresented before the First-tier Tribunal. She attended and gave oral evidence, as did AA. AA's mother and a family friend attended the hearing.
14. The appellant confirmed that her mother, father and sister, who reside in the United States, are aware as to AA's personal circumstances. AA informed the First-tier Tribunal that his present therapy was flexible, permitting the administration of testosterone every 12 weeks, however he believed that he would have to revert to a 2-week therapy if he lived in the United States.

15. Before this Tribunal the appellant and her partner relied upon individual witness statements, both dated 27 April 2021. The appellant confirmed that when AA visited her in the United States in 2015, he was due his next treatment of hormone replacement therapy. The couple identified and attended a clinic. The total cost was \$250 for the drop-in appointment and a further \$150 for the administration of the intramuscular injection.

16. AA explained in his statement:

'10. Injections can range in cost. Amounts have begun at \$30 and been found to exceed \$500. I believe an average price I could expect to pay to be \$150; though this doesn't include GP appointments nor blood tests required to check my hormone levels, or the cost of syringes. It is not uncommon for people to blindly go through hormone replacement therapy in the States, or miss injections due to financial reasons. It is extremely important for overall health for hormones to be managed correctly and it would be a challenge to ensure this. My particular injection grants quality of life and ease of use due to the low maintenance required but it largely popular in Europe, I have previously found in the United States is short of astronomical, an injection of 3ml at just under \$500 from some providers [sic]. I currently pay a £10 prescription charge.'

17. He explained as to the importance of his treatment:

'12. My identity as a trans man has had moments of what can only be described as deep mental anguish at times in my life. I can say without hesitation that my treatments improved this. It does not play a problematic role in my role. I consider this a privilege I wouldn't have in America. Acquiring hormones can often feel like a state of survival for trans people, and it is a state I haven't had to live in for a long time.

13. Should I not be able to receive treatment (hormones, surgery) as well as supporting treatments (blood tests) in the US then it would have a real impact on my mental health and sense of place in the world, but physically a deprivation in testosterone would affect my energy levels, my state of mind, it would affect my confidence and it would begin to affect my body, from weight distribution, weight gain and until further surgeries, infrequent injections can essentially 'start up' my female sex organs. It is also worth noting that hormone therapy can significantly affect the thyroid, which is extremely detrimental to a person's health. It is also worth mentioning that after a hysterectomy that missing any further hormone injections can seriously affect physical health. Hormones are important for any human being to balance.'

18. The appellant explained the regular difficulties AA experiences in explaining transgender to medical professionals:

'4. ... When you meet a new health professional, you have to disclose your personal information. Which means essentially that [AA] has had to

routinely 'come out' to multiple people over any length of time within the medical community. It is shocking to find out how little trained doctors know about the basic things that people who are Transgender face on a daily basis. It is frankly exhausting to have to educate, explain and interact in that capacity. ...'

19. The appellant confirmed that AA has experienced discrimination:

'5. ... He was heavily discriminated against at his workplace. His employers treated him with extreme disrespect, and it was revealed that they were tracking his personal medical information. This was absolutely unacceptable and [AA] ended up quitting. I encouraged him to find another job, where he would be treated with dignity and his gender identity would not be openly questioned or discussed by people who have no legal right to.'

20. The appellant expressed her concern that if she returned to the United States AA would lose her support at a time when he may be called in for extremely invasive and serious surgery. She observed that AA had been on a waiting list for two years for chest reconstruction surgery and then only given one week's notice as to his surgical appointment.

21. AA confirmed that the couple had enquired into private treatment in the United States, but they found the finances required were not manageable. They were concerned that seeking to secure such finances would affect their quality of living.

22. As to the cost of surgery in the United States, the appellant stated:

'7. ... The cost of receiving those surgeries in America is vast. We are extremely fortunate to live in a country where that is a medical expense that is recognised as a necessary surgery and not a cosmetic one, like in America. Many health providers do not consider gender reassignment surgery to be necessary to a Transgender person's life. ...'

## **Decision**

### *Preliminary Issues*

23. By means of the Tribunal's decision dated 18 December 2020, at [27], the appellant was directed to file and serve any additional evidence to be relied upon, accompanied by an appropriate rule 15(2A) application, no later than 14 days before the resumed hearing. Such time therefore expired on 20 April 2021.

24. The appellant filed and served further evidence to be relied upon, running to 74 pages, on 30 April 2021. There was no accompanying rule 15(2A) application or an explanation as to why the documents were filed in breach of directions.

25. On the morning of the hearing, Ms. White sought to file and serve further evidence, again with no accompanying rule 15(2A) application or explanation as to why the documents were filed in breach of directions.
26. I consider a breach of directions to be a serious matter.
27. Ms. White stated that she was unaware of the relevant direction, though she candidly accepted that the decision of 18 December 2020 had been received by Kesar & Co. She sought to explain that the Tribunal had previously been 'put on notice' as to the appellant's intention to rely upon further evidence but presented no cogent explanation as to why such vague unilateral assertion diminished not only an express direction of the Tribunal but also the mandatory nature of rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.
28. Ms. Cunha confirmed that she took no objection to the appellant relying upon the documents and so I exercised discretion and permitted the appellant to rely upon them.
29. Ms. White sought to rely upon an undated skeleton argument running to 7 pages. Whilst there was no direction as to the filing of a skeleton argument in this matter, a skeleton argument is usually of benefit to the Tribunal in its preparation and so gratefully received. However, in this matter the skeleton argument was sent to the Tribunal's correspondence team at 09.32 on the morning of the hearing. The Tribunal receives a considerable amount of email correspondence during the day, and any reasonable professional working in this field would expect a time delay in the internal forwarding of correspondence. Despite the best endeavours of administrative staff at Field House, the skeleton argument was forwarded onto me at 10.08 and I became aware of it a matter of minutes before the hearing commenced. In the circumstances, with a busy list, Ms. White gave no cogent explanation as to why the hearing should be subject to delay so that I should retire to read the document with the expected care. Consequently, the appellant was refused permission to rely upon the skeleton argument.
30. I share the exasperation of the High Court in its recent judgment of *Ahmed v. Ahmed* [2021] EWHC 1021 (Ch) as to how the very late service of skeleton arguments is expected by parties to aid a judge in preparing for a hearing. As a tool designed to be persuasive, its usefulness is significantly, if not fatally, undermined when it reaches the desk of a judge minutes before a hearing commences. The adoption by a lawyer of very late filing establishes an unhelpful mechanical approach to the production of a skeleton argument, rather than abiding by its primary role of aiding the Tribunal and consequently advancing their client's case.

### *Decision*

31. Ms. White confirmed that the appellant was unable to satisfy paragraph E-LTRP.3.1 of the Immigration Rules ('the Rules') in respect of financial requirements at the date

of application and so the appeal under the Rules proceeded in respect of paragraph EX.1(b) of Appendix FM.

32. At the commencement of the hearing Ms. Cunha confirmed that though it remained the position of the respondent that the decision of 2 September 2019 was correct as at the date it was served in light of the evidence presented at that date, the respondent's present position had altered. The respondent accepted in light of the information now available to her, when properly weighed, that it would be disproportionate for the couple to relocate to the United States and so the appellant properly succeeded under paragraph EX.1(b). Though the respondent's position remained that the appellant could not succeed on article 8 grounds outside of the Rules, Ms. Cunha accepted that the appeal should properly be allowed as the appellant succeeded under the Rules.
33. In respect of paragraph EX.1(b), I am satisfied that the concession made by Ms. Cunha was the only permissible option available to the respondent. Paragraph EX.1(b) and EX.2 provide:

'EX.1. This paragraph applies if

...

- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.'

34. The Supreme Court confirmed in *R (on the application of Agyarko) v. Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 W.L.R. 823 that the words 'insurmountable obstacles', defined in paragraph EX.2, establishes a strident test. The Court of Appeal confirmed in *Lal v. Secretary of State for the Home Department* [2019] EWCA Civ 1925, [2020] 1 W.L.R. 858 that the test is an objective one and so proper regard has to be had to the particular character and circumstances of the individual concerned.
35. I am satisfied that AA will have significant difficulties, in at least the short to mid-term and more likely than not in the longer-term, in securing regular access to blood tests and hormone replacement treatment in the United States consequent to a lack of

accessibility through cost and location. I am satisfied that any impact upon the regular administration of hormone replacement treatment, which is a key part of AA enjoying life in accordance with his identity, would entail very serious difficulties for him and adversely impact upon the family life he enjoys with the appellant. Upon relocation the likelihood of AA securing required surgery in the short to mid-term is minimal, also consequent to cost. This too, will entail very serious difficulties for AA and adversely impact upon the family life he enjoys with the appellant. Such significant difficulties would entail very serious hardship for the couple. In the circumstances, I am satisfied that the respondent was correct as to her concession in respect of paragraph EX.1(b).

36. As the appellant is successful in her appeal under the Immigration Rules, and the respondent agrees with such conclusion, I am not required to consider her appeal outside of the Rules. However, I observe that I would also have allowed the appeal on article 8 grounds outside of the Rules in light of the particular factual circumstances arising in this matter.

### **Notice of Decision**

37. By means of a decision sent to the parties on 18 December 2020 this Tribunal set aside the decision of the First-tier Tribunal promulgated on 6 May 2020 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
38. The decision is re-made, and the appellant's appeal on human rights (article 8) grounds is allowed.
39. An anonymity order is made.

### **Anonymity Order**

40. Pursuant to Rule 14 of the relevant Procedure Rules I make an anonymity order:

'Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant and her partner, AA. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant and her partner, AA, from the contents of the human rights claim becoming publicly known.'

Signed: *D. O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Dated: 10 May 2021



