



IAC-AH-PC-V1

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

Appeal Number: IA/21393/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 February and 27 August 2015**

**Decision & Reasons Promulgated
On 8 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS ZOE PATRICIA LOPEZ DE LABRADOR
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Secretary of State: Mr Avery (09.02.15) and Mr Duffy (27.08.15),
Specialist Appeals Team

For the Respondent/Claimant: Mr Blundell, Counsel instructed by M & K Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal on Article 8 grounds outside the Rules against the decision by the Secretary of State to refuse to grant her leave to remain as the spouse of a British national. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The claimant is a national of Venezuela, whose date of birth is 21 January 1961. On 1 April 2004 she flew in to Heathrow Airport, and was granted leave to enter for a period of six months as a visitor. She made a valid in-time application for ILR to remain as a dependent relative of her niece on 30 September 2004, but the application was refused on 4 February 2005. An appeal was lodged against this decision on 10 February 2005, and her appeal against this refusal decision was dismissed on 5 May 2006. A subsequent application for a High Court review was refused on 26 May 2006, and the claimant's appeal rights became exhausted on 8 June 2006.
3. There was no further contact with the claimant until 19 July 2010 when she applied for leave to remain on compassionate grounds outside the Rules. The application was refused without a right of appeal on 31 August 2010. Subsequently, pre-action protocol letters were submitted in January and June 2012 whereby the claimant requested a reconsideration of her application. On 10 April 2013 responses were issued to the pre-action protocol letters upholding the initial decision. Two further pre-action protocol letters were submitted in May and November 2013.
4. On 25 April 2014 the Secretary of State gave her reasons for refusing the application for leave to remain on reconsideration, and for making directions for her removal in accordance with Section 10 of the Immigration and Asylum Act 1999.
5. It was noted that in the pre-action protocol letter of 29 May 2013 the claimant's solicitors had relied upon a material development in the claimant's case. The material development was the claimant and her partner Mr Edward Stephens registering their marriage at a civil ceremony on 9 April 2013. The claimant's solicitors submitted it was unreasonable for Mr Stephens, a British national who had been born and raised in the UK, to be expected to be uprooted from his settled and established life in the UK and to relocate to Venezuela with the claimant.
6. With effect from 9 July 2012, the new Immigration Rules established a Rules-based approach to the consideration of Article 8 by defining the basis on which an applicant could enter or remain in the UK due to their family or private life.
7. Accordingly, consideration had been given as to whether the claimant qualified for leave to remain under Rule 276ADE(vi). She was a fluent Spanish speaker, and thus there was no linguistic impediment posed by her return to Venezuela. She had been raised and educated in Venezuela, and had spent 43 years of her life there. Moreover, it was noted that during her previous appeal hearing she had advised that she had two daughters and two sisters still resident in Venezuela. Whilst she had never had any legal entitlement to live and work in the UK, she had managed to support herself apparently without recourse to public funds. So there would be no undue hardship in expecting her to do the same in her country of origin, where she could lawfully engage in work and would have the assistance of her family to aid reintegration.
8. With respect to family life, it was noted that there was no reference to the claimant's relationship with Mr Edward Stephens at the time of her appeal in 2005 and 2006.

The claimant did not meet the requirements for limited leave to remain as a partner under R-LTRP as she had not made a valid application for limited leave to remain as a partner. Consideration had been given as to whether she met the requirements of R-LTRP.1.1(d), one of the requirements of which was that paragraph EX.1 applied. The claimant needed to satisfy the following criteria: “(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen ... and there are insurmountable obstacles to family life with that partner continuing outside the UK.”

9. It was accepted on the basis of the evidence produced that the claimant was in a genuine and subsisting relationship with a person settled in the UK. But it was not accepted there were insurmountable obstacles to the family life enjoyed by the claimant and Mr Stephens being continued in Venezuela. In determining whether there were insurmountable obstacles, consideration had been given to the seriousness of the difficulties which the claimant and her partner would face in continuing family life outside the UK and whether they entailed something that could not be overcome even with a degree of hardship for one or more of the individuals concerned.
10. There were no impediments to the claimant entering or residing in Venezuela with Mr Stephens. It was noted that Mr Stephens suffered from a heart attack in 2011, but he had not evinced evidence of any ongoing health complaints which merited ongoing treatment.
11. The alternative which would involve least disruption would be to require the claimant to return to Venezuela of her own volition, and to seek entry clearance in the correct capacity. The claimant and her partner had at all material times been fully cognisant of the claimant’s immigration status. She did not attempt to regularise her status, after she became appeal rights exhausted in 2006, for a further four years. That being the case, they would have been aware of the impermanence of their relationship as the claimant was liable to removal by virtue of her remaining in the UK without leave.

The Hearing before, and the Decision of, the First-tier Tribunal

12. The claimant’s appeal came before Judge North sitting at Bennett House, Stoke-on-Trent, on 19 August 2014. Mr Halligan of Counsel appeared on behalf of the claimant, and the Secretary of State was represented by Ms Hussain, Home Office Presenting Officer. The judge received oral evidence from the claimant and Mr Stephens.
13. In his subsequent decision, Judge North said that the appeal was pursued on the basis that there were insurmountable difficulties in the claimant and her husband continuing their family life in Venezuela; alternatively, it would not be proportionate to expect the claimant to return to Venezuela and make an application for entry clearance as a spouse from there.

14. At paragraph 8 he found that the claimant had met Mr Stephens in August 2004, when she was living with her niece, her niece's husband and her great nephew. Her relationship with Mr Stephens deepened, and they decided to live together in 2006. The claimant had divorced her first husband in 2004, and Mr Stephens divorced his first wife in May 2011. He had two children by that marriage and grandchildren, whom he saw regularly.
15. At paragraph 9, the judge found that Mr Stephens was 67 years of age. Although he was past retirement age, he still worked as a lorry driver for Leicestershire Council on a part-time basis. Although he no longer saw a consultant in respect of a heart attack which he had suffered on 13 July 2011, he needed to take appropriate medication. He had chronic obstructive pulmonary disease, for which he took medication in the form of oral sprays. He did not speak Spanish. With his state pension and earnings, he had sufficient to be able to fund the claimant's return to the UK as his spouse if necessary. His annual income from his pension and wages was in excess of £16,400. He also had savings of £32,000 which were accruing interest.
16. At paragraph 10 the judge found that Mr Stephens could not reasonably be expected to relocate to Venezuela. Given his age and health history, he would not find alternative employment either in Venezuela or again in the UK if required to interrupt his present employment. He had experienced serious health problems in the past, and he did not discount that the stress of moving to an unknown country and culture would significantly impact on Mr Stephens. The judge continued in paragraph 11:

"The alternative suggestion is that the claimant can return to Venezuela and make an application to re-enter the United Kingdom as a spouse. I am mindful of the provision in **Chikwamba**. On the evidence before me, it appears highly likely that the claimant would be granted entry clearance to re-enter the UK as a spouse. I am in no doubt that her relationship with Mr Stephens is genuine, subsisting and longstanding. In the particular circumstances of this case, I find so much must be set against concerns that the claimant might be seen to be queue-jumping if she does not return to Venezuela to make the application."
17. The judge concluded in paragraph 12 that while the Secretary of State's decision was in accordance with the Rules, the consequential interference with the private and family life of the claimant and the sponsor was disproportionate to the need to enforce firm and fair immigration control. So he allowed the appeal on human rights grounds.

The Application for Permission to Appeal

18. Ms Jamila Hussain on behalf of the Secretary of State settled an application for permission to appeal to the Upper Tribunal. She submitted that the judge had failed to give adequate reasons for findings on material matters. The concerns that arose around **Chikwamba** were the prospective length and degree of family disruption involved in the claimant going abroad for entry clearance. Provided all the relevant and requisite information was provided with any application, the visa would only take a few months to process. During that time, either the sponsor could accompany

the claimant to Venezuela or he could stay here. That would not be a disproportionate interference.

19. The claimant's circumstances did not amount to compassionate or compelling circumstances, especially when taken in line with her immigration history. She was an overstayer for four years, and having been fully aware she had no right to remain in the UK, she still formed or developed a relationship while her immigration status was precarious. Her explanation for not contacting the Home Office for four years was that she believed that an application was put in place by her previous solicitors, and it appeared that the judge accepted this. But the case of **BT (Nepal)** stated that if an appeal is based in whole or in part on allegations about the conduct of former representatives, there must be evidence that those allegations have been put to the former representative, and the Tribunal must be shown either the response or correspondence indicating there has been no response.

The Grant of Permission to Appeal

20. On 9 October 2014 Judge Reid granted permission to appeal for the following reasons:

"It is arguable that the judge failed to give adequate reasons for finding, absent medical evidence, the claimant's husband could not reasonably be expected to move to Venezuela (where the claimant has two adult daughters). It is arguable that the judge speculated as to the husband's employment prospects in Venezuela. The judge noted an entry clearance application was highly likely to succeed however it is arguable he failed to give adequate reasons why the claimant's immigration history should carry little weight in the proportionality analysis or why it would be unreasonable for the claimant's husband to accompany her to Venezuela while she made the application."

The Error of Law Hearing

21. Mr Avery submitted that the judge had failed to follow a structured two-stage approach, and when dealing with proportionality had failed to take any account of the claimant's adverse immigration history. There was also no reference to Section 117B of the 2002 Act.
22. In reply, Mr Blundell submitted that there were in essence two grounds of appeal, one relating to the question of whether there were insurmountable obstacles to the couple settling in Venezuela; and the other relating to the question of whether the judge had given adequate reasons for finding that it was not reasonable to expect the claimant to return to Venezuela to seek entry clearance to the UK as Mr Stephens' spouse.
23. He referred me to the definition of insurmountable obstacles contained in EX.2 which was inserted from 28 July 2014: "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."

24. Mr Blundell accepted that the judge had not in terms assessed whether the evidence met the high threshold of insurmountable obstacles. But he submitted that, following Edgehill and Another v Secretary of State for the Home Department [2014] EWCA Civ 402 the judge was right to conduct a freewheeling Article 8 assessment outside the Rules under which he was merely required to determine whether it was reasonable to expect Mr Stephens to settle with the claimant in Venezuela, in line with old authorities such as VW (Uganda). This was because the decision under appeal related back to an application which had been made in 2010, and hence before the introduction of the new Rules in June 2012.
25. As to the judge's approach to the Chikwamba issue, he submitted that his approach was compliant with the observations of the Court of Appeal in Secretary of State for the Home Department v Hayat and Another [2013] Imm AR 1 and his conclusion was open to him on the evidence. He relied on the well-known passage from Piglowska Piglowski [1999] WLR 1360 at 1372(d) to (f) where Lord Hoffmann said:

"First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc. v Medeva Ltd. [1997] R.P.C. 1, 45:

'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'"

Reasons for Finding an Error of Law

26. The decision under appeal is not the decision which was taken in 2010, which did not attract a right of appeal. Moreover, the decision taken in 2010 was only to refuse to grant the claimant leave to remain outside the Rules. There was not a concomitant decision to make directions for her removal.
27. The eventual decision to remove the claimant came about after protracted correspondence between the claimant's solicitors and the Home Office. The first two pre-action protocol letters from the claimant's solicitors preceded the introduction of the new Rules, but the two most recent pre-action protocol letters were sent well after the introduction of the new Rules, following a response letter from the Home Office dated 18 April 2013.
28. The two grounds on which the claimant's solicitors asked the Home Office to reconsider the claimant's case were firstly that there had been a material change of circumstances and secondly that the claimant wished a decision to be made on removal, so as to give her a right of appeal against an adverse decision on removal.

The material change of circumstances relied on was the claimant getting married to Mr Stephens, an event which took place after the introduction of the new Rules.

29. In all the circumstances, I do not consider that the decision under appeal can be treated as relating back to an application made in 2010. The ratio of Edgehill is that the transitional provisions set out in the Statement of Changes HC 194 provided that an application for ILR made before 9 July 2012 but not yet decided would be decided in accordance with the old Rules, and that it was therefore wrong to assess an application for ILR made before 9 July 2012 under the new and less favourable twenty year Rule, rather than under the old and more favourable fourteen year Rule. Here, the application made in 2010 was decided in 2010. It is debatable whether the correspondence in the first part of 2012 constituted a fresh application. But even if it did, the application was refused in April 2013. The decision under appeal is a response to further representations received after April 2013, and so the Secretary of State is not debarred from assessing the Article 8 claim by reference to the new Rules.
30. As stated in the latest published Home Office guidance, the assessment of whether there are insurmountable obstacles is a different and more stringent assessment than whether it would be reasonable to expect the applicant's partner to join them overseas. The judge referred to insurmountable difficulties in paragraph 7, but did not go on to make a finding of insurmountable obstacles. He merely found at paragraph 10 that Mr Stephens could not reasonably be expected to relocate to Venezuela, having considered the evidence referred to in paragraph 9. While the judge began on the correct trajectory, he ended up asking himself the wrong question.
31. If he meant to find that there were insurmountable obstacles to the couple enjoying family life together in Venezuela, the judge gave inadequate reasons for reaching such a conclusion. Alternatively, if the judge accepted that the evidence fell short of establishing insurmountable obstacles within the meaning of EX.1(b), the judge needed to state this; and the judge needed to go on to identify compelling reasons not sufficiently recognised under the Rules as to why the claimant should nonetheless be granted Article 8 relief.
32. As stated in the refusal letter, the least disruptive option for the claimant and her husband was for the claimant to return to Venezuela to make an application for entry clearance. The judge's assessment of the reasonableness of that option is wholly inadequate. The claimant's poor immigration history was a highly material consideration which the judge wholly failed to take into account. The judge also did not address the question of how long any period of separation was likely to be.
33. In Hayat, at paragraph [50] Elias LJ said that the first instance judge had rightly focused on three matters which went both to the substantive merits of an Article 8 claim and were also relevant to the question whether it was in any event legitimate to require the applicant to make his application from Pakistan:

"The first is that as persons only permitted to be temporarily in the UK, neither the applicant nor his wife had any legitimate expectation of a right to remain. The second

is that the family life could continue in Pakistan, although the wife would for obvious reasons not wish to return. The third was that any period of separation would be short. In Chikwamba Lord Brown specifically identified the length and degree of family disruption as a factor which would be highly relevant to the question whether it is proportionate to insist that the application be made from abroad ...”

34. At paragraph [51], Elias LJ said that these were all proper considerations to weigh in the balance when considering the merits of the Article 8 claim. As the Secretary of State pointed out in her submissions, there was strong Strasbourg and domestic authority to the effect that only in exceptional circumstances would a couple who had formed a union in full knowledge of the precarious immigration status of either of them be entitled to remain pursuant to Article 8 rights: see Y v Russia [2010] 51 EHRR 21 paragraph 104.
35. Accordingly, Elias LJ continued in paragraph [52], the Upper Tribunal was not justified in concluding that the only factor militating against the application of Article 8 was the fact that the applicant had not made his application from Pakistan. On the contrary, there were cogent factors justifying the conclusion that Article 8 was not infringed by requiring the appellant to return to Pakistan.
36. Accordingly, for the reasons given above, the decision of the First-tier Tribunal is vitiated by a material error of law such that it should be set aside and remade.

Directions for Remaking

37. Mr Blundell and Mr Avery were in agreement that this is a suitable case to be remade in the Upper Tribunal. Mr Avery was content that the decision should be remade on the evidence as it stood, whereas Mr Blundell said he wished to adduce additional evidence on the availability of the sponsor’s medication in Venezuela, and on the conditions prevailing in Venezuela generally, which he indicated were dire. I was persuaded that it was in accordance with the overriding objective that the claimant be afforded the opportunity to adduce additional evidence on these topics.
38. I gave the claimant permission to adduce additional evidence that was not before the First-tier Tribunal on the topic of (a) the sponsor’s current medication, and the availability of such medication in Venezuela; and (b) conditions in Venezuela generally, provided such evidence was served in a paginated and indexed bundle on the Specialist Appeals Team and the Upper Tribunal not less than seven days before the resumed hearing. I also directed that the resumed hearing should be fixed at the convenience of Mr Blundell of Counsel if possible.

The Resumed Hearing

39. For the purposes of remaking the decision, the claimant’s solicitors filed with the Upper Tribunal an extensive number of documents relating primarily to the topic of the sponsor’s current medication, and the availability of such medication in Venezuela, but also relating to conditions in Venezuela generally.

40. A Spanish interpreter had not been requested for the hearing, but this did not present a procedural obstacle, as Mr Duffy made it clear that he was not proposing to cross-examination the appellant on her evidence in any event. Mr Blundell simply asked the appellant to adopt the witness statement which she had made for the hearing in the First-tier Tribunal, and her command of English was sufficient to enable her to do so.
41. Mr Stephens was called as a witness, and was examined at length about his various medical conditions, and about the medication which he was required to take on a daily basis in order to manage these conditions.
42. In cross-examination, Mr Stephens acknowledged that he continued to work part time and that he was also able to draw on two pensions. He estimated that his current annual income, including the two pensions which yielded £14,500 per annum, was just under £23,000. He worked part-time for the council as a lorry driver. The property which he owned was worth between £145,000 and £155,000, and it was unmortgaged. He also had between £40,000 to £45,000 in savings.
43. In his closing submissions on behalf of the Secretary of State, Mr Duffy relied on what was said in the decision letter of 25 April 2014 on the topic of insurmountable obstacles. The focus had to be on the family life which would be enjoyed in the country to which an applicant would be returned not a comparison to the life they would enjoy were they to remain in the UK. On the topic of the impact of a mental or physical disability, it was noted that Mr Stephens had suffered from a heart attack in 2011. However he had evinced no evidence of any ongoing health complaints which merited treatment, accordingly it was not considered unreasonable to expect him to continue his family life in Venezuela.
44. While he did not in dispute that Mr Stephens took the medication which was referred to in the disclosed documents, he submitted that Mr Stephens had sufficient funds available to him to purchase the medicines he required in Venezuela privately. Even if he could not source them locally, he could either import the medicines from abroad or he could travel to other countries to obtain the medicines. As a British national, he had the freedom of movement to get his drugs elsewhere.
45. In reply, Mr Blundell referred me to his skeleton argument and drew my attention to pages 258 to 260 of the supplementary bundle. In an article dated 28 April 2015 which was carried online by the Daily Mail it was reported that desperate patients had been forced to beg for medicine on Twitter on Venezuela because the crumbling economy had left the country unable to import medical supplies. Venezuelans were pleading with foreigners to send them medicines using the hash tag "Servicio publico". They were in desperate need of treatment for all manner of medical conditions - including blood disorders, viruses and infections. Venezuela's economy was crumbling and medical supplies were running out. Pharmaceutical companies were unable to pay international suppliers due to a lack of foreign currency in the country. One tweet using the "Servicio publico" hash tag was sent on behalf of a 22-year-old, who desperately needed 10mg of solution for use in injections to treat her

severe coronary condition. The tweet itself was sent by her uncle who, despite being a pharmacist with good contacts, had had no luck obtaining his niece's medicine himself. The uncle was quoted as saying that if those who were inside the pharma business could not locate the products, what could a regular citizen expect to find? Pharmacy shelves lay empty, with even basics like vitamin C, folic acid, headache pills and remedies for mosquito bites almost entirely unavailable in the capital Caracas. Medical shipments had dried up as Venezuelan pharmaceutical companies seek to pay off their combined debts of well in excess of 245,000,000 dollars, rather than bring in additional expensive products. A black market in goods was understood to have been established, with drugs being smuggled in from neighbouring Colombia, but the supply was not nearly enough to provide medicine for all who needed it. The article continued:

'The only response from the Venezuelan government to the developing crisis so far had been to issue a directive stating: 'It is strictly prohibited for patients or their families to bring medicines or medical supplies for their treatment, even if hospitals don't have the necessary supplies.'

46. Mr Blundell also relied on a report on Mr Stephens prepared by Dr Skehan, consultant cardiologist, of 14 July 2015. Dr Skehan opines that Mr Stephens has made continued good progress after a previous heart attack. However there has to be continued adherence to the disciplines of regular prophylactic medications, as well as not smoking and keeping his exercise level to a reasonable intensity. He says that Mr Stevens is a generally low risk status at the moment, but there is a real potential for problems where modern medical surveillance might be important for him.

Discussion and Findings

47. The issue which arises on the evidence is whether Mr Stephens would be likely to encounter very significant difficulties in maintaining his drugs regime, and hence his health, if he was required to settle in Venezuela with the appellant on a permanent basis; and whether such difficulties could not be overcome or would entail very serious hardship for either him or his wife.
48. I do not consider that this issue is adequately addressed in the decision letter. The decision maker proceeded on the mistaken basis that Mr Stephens has not evinced evidence of any ongoing health complaints since 2011 which merit treatment. On the contrary, there is clear evidence of Mr Stephens having ongoing health complaints which require him to take some ten or eleven different drugs daily in order for them to be managed and kept under control.
49. Although Mr Stephens might well have the financial resources to obtain privately the medicines he needs in Venezuela, it is very unlikely (as things stand) that many of these drugs, or suitable alternatives, would actually be available in Venezuela to be purchased. Indeed, the situation is so dire that it is questionable whether any of them would be available for private purchase.

50. It is not an adequate answer on Mr Duffy's part to say that Mr Stephens can arrange for the medicines he requires to be imported, as there is a government ban on the import of medicines, and the claimant and her partner cannot be expected to break the law. Given the ban, it is also not a reasonable proposition that Mr Stephens should travel out of Venezuela and bring back the medicine he requires in his luggage. This would still breach the ban on the importation of medicines.
51. One of the conditions that Mr Stephens suffers from is CPOD. For this he is prescribed an Oxis6 turbobaler, which he must puff on twice per day. Mr Stephens gave credible and unchallenged evidence that he needed these sprays to assist him in breathing, and it was very difficult for him to breath without them. The level of distress and discomfort which Mr Stephens would suffer in Venezuela if he was not able to access a spray which assisted him in breathing would be likely to be very considerable, and would amount to very serious hardship.
52. I accept that the couple's relocation to Venezuela for settlement on a permanent basis is a purely theoretical consideration, in that the obvious and far more attractive alternative is for the claimant to return to Venezuela on her own to seek entry clearance to return as Mr Stephen's partner, an application which is very likely to be successful. But the claimant is entitled to resist removal, and hence the requirement to return to Venezuela to seek entry clearance, if she can show that there are insurmountable obstacles, within the meaning of paragraph EX.2, to her and her partner carrying on family life on a permanent basis in Venezuela. On a holistic assessment of the evidence, I find that the claimant has discharged the burden of proving that her appeal should be allowed under Appendix FM.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and accordingly the decision is set aside and the following decision is substituted: this appeal is allowed under Appendix FM of the Rules.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson