



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

Appeal Number: IA/27267/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 3 July 2017**

**Decision &  
Promulgated**

**On 21 July 2017**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**GRACE [F]  
(ANONYMITY DIRECTION NOT MADE)**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

Respondent

**Representation:**

For the Appellant: In person

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her application for leave to remain in the United Kingdom.
2. Miss [F] appeared in person and confirmed that she was happy to proceed unrepresented. She was assisted by her husband, [EC].

3. The appellant came to the United Kingdom in March 2002 as a visitor. On 11 March 2014 she applied for leave to remain under the ten year private/family life route. This was refused on 10 April 2014 with no right of appeal and she was subsequently served with a notice of removal and later submitted a Statement of Additional Grounds and her application was considered and refused in the decision under challenge.
4. The case was considered under EX.1(b) and the respondent concluded that there were no insurmountable obstacles to family life continuing in Zimbabwe where the appellant had spent her formative years and where her husband [EC] had also lived. It was noted that since she had only lived in the United Kingdom for thirteen years she did not meet the long residence requirement of twenty years under paragraph 276ADE. It was not accepted that there would be very significant obstacles to her integration into Zimbabwe if she were required to leave the United Kingdom. Nor did the respondent find that there were any exceptional circumstances which would warrant a grant of leave to remain outside the Rules. The appellant is married to [EC] who has indefinite leave to remain. She was awaiting surgery for uterine fibroids. It was considered that her husband would be able to accompany her back to Zimbabwe and the evidence did not show that her medical condition amounted to an exceptional circumstance.
5. These matters were all considered by the judge, before whom again Miss [F] appeared in person. I mention in passing the fact that at paragraph 16 when referring to the appellant's sister and mother, both of whom live in the United Kingdom, the judge said that the appellant's mother suffers from dementia. This was clarified by the appellant in her grounds and in submissions before me to the fact that her mother in fact suffers from leukaemia and hepatitis B and has significant sight problems but does not suffer from dementia. It was true, however, as set out by the judge that the appellant and her sister take it in turns to look after their mother.
6. The judge considered the case under the relevant Immigration Rule which is EX.1(b) of Appendix FM. This provides for leave to remain to be granted in circumstances where the applicant has a genuine and subsisting relationship with a partner who is in the United Kingdom and is a British citizen, settled in the United Kingdom or in the United Kingdom with refugee leave or humanitarian protection and where there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom. The judge noted the high hurdle involved in relation to insurmountable obstacles, referring to what was said by the Court of Appeal in Agyarko [2015] EWCA Civ 440. The judge noted that the appellant and [EC] had both spent their formative years in Zimbabwe. He noted that [EC] is well qualified and also heavily involved with the African Apostolic Church in the United Kingdom. The judge considered he would be able to seek employment in Zimbabwe, and though relocation might be difficult for them both, and there was rising inflation in

Zimbabwe, and it was said that the medical treatment was substandard and quality of life not good, the judge concluded that the requirements of the Rules were not met.

7. He went on to consider Article 8 outside the Rules. He concluded that there were no exceptional circumstances tipping the balance in the appellant's favour. He had regard to relevant case law authorities including Agyarko and also Nagre [2013] EWHC 720 (Admin). He bore in mind the public interest considerations under section 117B of the Nationality, Immigration and Asylum Act 2002. He noted with regard to the appellant's mother and sister that she would be able to maintain contact with them from abroad via telephone or other modern means of communication and overall that there were no exceptional circumstances warranting a finding that removal would be a disproportionate interference with the appellant's Article 8 rights, bearing in mind also her health problems and the contact [EC] would be able to maintain with his children in the United Kingdom.
8. Permission to appeal this decision was refused in the First-tier but was granted in the Upper Tribunal on the following basis:
  - “1. It is arguable that in assessing proportionality for the purposes of Article 8 the First-tier Tribunal irrationally found that the appellant would be able to maintain her relationship with her mother by telephone or other means of modern communication.
  2. This is arguably inconsistent with the evidence recorded at [16] that the appellant's mother suffers from dementia and her sister (who has three children) and herself take it in turn to look after her”.
9. In her Rule 24 response the Secretary of State pointed out that permission had been granted on an issue on which permission had not been sought, and contended that the judge had correctly applied the Immigration Rules and considered matters properly outside the Rules.
10. With Miss [F]'s agreement I heard first from Mr Jarvis, so as to enable her to know the points against which she would need to argue.
11. Mr Jarvis relied on the Rule 24 response. He argued that the judge had apparently misunderstood the health condition of the appellant's mother, but those findings did not go to the core of the insurmountable obstacles issue. He argued that the judge's decision was properly in line with the authorities such as Agyarko, and though it was not a question of obstacles which were literally insurmountable, it was nevertheless a very demanding test and was derived from European authority. The decision in Agyarko, taking into account also what had been said by the European Court of Human Rights in Jeunesse v the Netherlands [2014] ECHR 1036, on facts in many ways similar to those in the instant case, concluded that Article 8

rights were not breached. Clearly each case depended upon its own facts, but the judge had demonstrably understood the test and considered the matter both within and outside the Rules.

12. In her submissions Miss [F] asked that a visa be granted so that she could live with her husband and enjoy family life and have a chance to bear children and be around her family and look after her mother. She wanted to be with her husband as he saw his children grew. Her husband was settled in the United Kingdom and there are a lot of hardships now in Zimbabwe and she personally was under medical review. With regard to her sister, she like their mother lived in Buckinghamshire, and had three children and worked full-time as a social worker so they would take turns, sometimes she, Miss [F], would go to stay with her mother, and at other times her mother would come to her in Southampton. Her husband was in the church and she helped him to do his job. They had been in the United Kingdom for a long time, there was the work in the church and she had no criminal record. She helped in particular with the girls and the women in the church and mentored them to be good in society.
13. I reserved my determination.
14. Permission to appeal in this case was restricted by the judge who granted permission to the issue in respect of proportionality of the Article 8 decision of the abilities the judge found it for the appellant to be able to maintain her relationship with her mother by telephone or other means of modern communication. The judge who granted permission, as did the judge who heard the appeal, erred as to the appellant's mother's health condition, which is as set out above. As Mr Jarvis pointed out however, the situation would be essentially the same in that regard in that her mother has ongoing health problems and clearly it would be much more difficult for her sister to cope with the care she provides for her if she did not have the support of the appellant.
15. This does not however identify any error of law in the judge's decision. It was properly open to him to conclude that the kind of contact to which he referred could be maintained from outside the United Kingdom. It appears from what Miss [F] said to me today that her mother is able to travel from Buckinghamshire to visit her in Southampton, and the medical evidence that I have seen does not evidence a state of acuteness in her health problems at the time that documentation was written. That documentation was before the judge, and I consider that it has not been shown that he erred in any respect in his conclusions with regard to the Article 8 issue and the appellant's ongoing contact possibilities with her mother and her sister.
16. Technically that is an end of the matter, but I think that as it was the focus of Miss [F]'s submissions, I should say something about the judge's decision with regard to family life with her husband and the other issues.

17. Again I agree with Mr Jarvis on this. It is clearly problematic for the appellant either to have to leave the United Kingdom without [EC], or for him to leave the family and work that he has in the United Kingdom and go with her to Zimbabwe. There are the problems with the Zimbabwean economy and healthcare there and the difficulties they might experience in getting jobs. But, as Mr Jarvis pointed out, the threshold is a very steep one. Though insurmountable obstacles are not ones that have to be literally insurmountable, they are nevertheless obstacles which it would be very difficult to surmount, and I consider it was properly open to the judge to conclude that there are not insurmountable obstacles to family life with [EC] continuing for the appellant outside the United Kingdom, bearing in mind, as the judge noted, the fact that he spent his formative years in Zimbabwe and is well qualified. The judge was fully aware both of the correct test and the evidence to be considered in the context of applying that test, and came to conclusions which were properly open to him. In particular paragraph 20 of the decision with regard to the situation under the Rules and paragraphs 21 to 23 with regard to the position outside the Rules are sound evaluations of the evidence in the context of the relevant legal provisions. It is not irrelevant, for example, to note as the judge did at paragraph 22 that he is required to give little weight to a relationship formed with a qualifying partner that is established by a person at the time when the person is in the United Kingdom unlawfully, and that was the case for the appellant, as it would seem from paragraph 15 of the judgment, from fairly early in March 2002. The judge noted she has been in the United Kingdom without leave for fourteen years and her family and private life have been formed under conditions of unlawful residence.
18. This is clearly a sympathetic case. The appellant and [EC] presented themselves as entirely honest people who are going to face difficulties whether they return to Zimbabwe together or the appellant goes separately. But my task is to decide whether or not there is an error of law in the judge's decision, and in my conclusion the judge clearly applied the correct legal Rules to the situation on the evidence concerning the appellant, and that decision cannot be faulted as a matter of law.
19. Accordingly the judge's decision refusing this appeal is maintained.

No anonymity direction is made.



Signed

Date 20 July 2017

Upper Tribunal Judge Allen