



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/20240/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 28 August 2018

Decision & Reasons Promulgated  
On 24 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

JOHANE VAMBE  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Mackenzie, Counsel instructed by Legal Rights Partnership  
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is an overstayer, appeals from the decision of the First-tier Tribunal (Judge Rolt sitting at Columbus House, Newport on 1 November 2017) dismissing his appeal against the decision of the Secretary of State made on 5 August 2016 to refuse to grant him limited leave to remain on the basis of him having resided in the UK for 15 years from the time when he had entered the United Kingdom as a visitor from

Zimbabwe, and having developed a private life such that his removal would breach his rights under Article 8 ECHR. The Judge found that there would not be very significant obstacles to the appellant reintegrating into life and society in Zimbabwe, to which he would be returning with his Zimbabwean wife, who was also an overstayer; and, having applied the five-point **Razgar** test, he concluded that there were not compelling circumstances that rendered his removal disproportionate to the need for effective immigration control.

### **The Reasons for the Grant of Permission to Appeal to the Upper Tribunal**

2. Mr Mackenzie of Counsel, who appeared for the appellant before Judge Rolt, advanced three grounds of appeal. The first ground was that the Judge had misdirected himself as to his proper task under Article 8. The Immigration Rules were not law and did not govern the determination of human rights questions by the Tribunal. The public interests in a given case depended upon the facts, to be assessed by the Tribunal, and the public interest must be weighed against the factors in the applicant's favour. The ultimate question was always whether the authorities had struck a fair balance between the individual and public interests, and the question could be answered only by a careful balancing of the relevant factors: see the balance sheet approach endorsed by Lord Thomas in **Hesham Ali -v- SSHD [2016] UKSC 60** at [83]-[84].
3. Ground 2 was that the Judge had failed to take account of all relevant circumstances when assessing proportionality. In particular, a significant plank of the appellant's case was that he had been seriously ill with cancer and HIV. The Judge was not entitled, on the evidence, to find that the appellant had made a good recovery. On the contrary, the unchallenged evidence was that he was still had HIV, that he was in the process of recovery from cancer, and that he was currently unfit to work even as a Pastor of his Church.
4. Ground 3 was that the Judge had failed to consider how the appellant's role as a Pastor in his local community affected the public interest in removing him, following **UE (Nigeria) -v- SSHD [2010] EWCA Civ 975**, where the Court of Appeal accepted that it could be relevant, in assessing the public interest, to consider the loss to the community presented to an individual. That could reduce the weight attached to the public interest of maintaining immigration control.

### **The Reasons for Initial Restricted Grant of Permission to Appeal**

5. On 11 April 2018 First-tier Tribunal Judge Nightingale granted permission to appeal on Ground 1, as it was arguable that the Judge fell into error in applying **Gulshan** and requiring exceptional circumstances before considering Article 8 outside of the Immigration Rules. The Judge had not appeared to consider the principles in **Hesham Ali -v- SHSD [2016] UKSC 60** and the other case law cited in the grounds of appeal.
6. However, contrary to the pleaded grounds, the Judge did consider the appellant's health, and was entitled to conclude that the appellant had made a good recovery based upon the medical evidence before the Tribunal. No arguable error of law arose

on this ground. In view of section 117B of the 2002 Act, the Judge was entitled to give little weight to the appellant's private life, including his contribution to his church and wider community. No arguable error of law arose on that ground either. Accordingly, permission was granted but limited to Ground 1.

### **The Reasons for the Eventual Grant of Permission on All Three Grounds**

7. Following an application to the Upper Tribunal, Upper Tribunal Judge Hanson granted permission to the appellant to pursue Grounds 2 and 3, as he was satisfied that they were also arguable.

### **The Rules 24 Response**

8. On 23 August 2018 Mr Melvin served a Rule 24 response opposing the appeal. With regard to Ground 1, he submitted that **Hesham Ali** did not alter the need for compelling circumstances to be shown to succeed outside the Rules, and this was confirmed by the Court of Appeal in **TZ (Pakistan) EWCA Civ 1109 [2018]** in which the Court held (in line with **Agyarko**): *"In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."*

### **The Decision of the First-tier Tribunal**

9. At the hearing before Judge Rolt, the appellant and his wife gave oral evidence, and they were cross-examined by the Presenting Officer. At paragraphs [17]-[28] of his decision, the Judge set out those aspects of the evidence which he considered to be pertinent to the case which Mr Mackenzie had outlined at the outset of the hearing, which was that there was no appeal under Article 3 ECHR on medical grounds, but that the appellant's health problems had to be considered along with all the other evidence, including his long residence and contribution to the community.
10. The appellant's evidence was that he had come to the UK as a visitor in 2001, and he knew that he was not allowed to stay. He confirmed that he knew that the application for leave to remain made on 23 December 2009, had been refused in 2010. He considered that Mr Wainwright, a Barrister who was subsequently disbarred, had undertaken to lodge an appeal on his behalf. It was not until about April 2015 that he found that no appeal had been made. He made enquiries of the office of the firm, and was told that Mr Wainwright had been "*struck off*". He said that he had been in contact with Mr Wainwright by email in 2013, but he did not have these emails. He had instructed his new solicitor in about January 2016. He could not explain the delay.
11. He said that he had done some cleaning work for friends in return for help. He had not declared any income to HMRC. He lived in a house which was rented by his church and was used by him and his church. The rent was £1,000 per month and was paid for by donations of the congregation. The Church members provided him with bread or food for his needs. Membership of the Church was multi-national. There were about 50 members from Zimbabwe. He had not spoken with any members about

any help they could give him if he returned to Zimbabwe. He described himself as the father of the community and that members looked up to him.

12. In her evidence, the appellant's wife said that she knew there was no right of appeal against the refusal of the application made in 2009, but that Mr Wainwright had told her that she should appeal anyway and he would let them know how the appeal progressed. It was not until April 2015 that she decided that she and her husband should find out what had happened, and they called the office to be told that Mr Wainwright had been struck off. She had not sought further advice until January 2016 because she was trying to work out what to do.
13. The Judge set out the closing submissions of the Presenting Officer and Mr Mackenzie at paragraphs [29]-[30] of his decision. The Presenting Officer, Mr Holt, submitted that the appellant would be returning to Zimbabwe, where he had family. He had also lived and worked independently in Harare. He was cancer-free and on appropriate medication. There was no Article 3 application. The appellant was clearly of an enterprising nature and had set up a church. He could support himself in Zimbabwe. Outside the Rules, any application had to be made based upon private life and therefore S117B had to be considered. He had lived with his wife for many years. All the medical treatment had been paid for by the taxpayer. He had never declared any income. He had overstayed and he was not entitled to be in the UK. He had taken nearly one year after finding out about Mr Wainwright to take any further action. He had hidden from the authorities for 8 years before the application of 2009. The refusal letter of 2010 clearly stated that there was no right of appeal. There was no evidence that he pursued the alleged appeal between 2010 and 2015. He knew his status was precarious and there was family in Zimbabwe.
14. Mr Mackenzie submitted that the approach required was a holistic one, taking into account all the circumstances, including his health and ties to the community. It was not just a matter of applying the Rules in a processed-based way. The appellant's activities in the church reduced the public interest in removing him. His activities were not contested. He provided a pastoral role. If he had been in the UK for 20 years he could remain within the Rules. There was no significant difference between 16 and 20 years. It was obviously the case that the appellant could not say what the healthcare situation was like in Zimbabwe, but it was common knowledge that the situation was not good. His situation, taken in the round, meant that he should remain and the public interest did not outweigh his Article 8 rights.
15. The Judge set out his findings at paragraphs [31]-[52]. He directed himself, at paragraph [32], that the appellant could succeed under the Rules if he could show that there would be very significant obstacles preventing him from continuing with or re-establishing and developing his private life upon return to Zimbabwe. Alternatively, he could succeed under Article 8 outside the Rules.
16. The Judge then proceeded to make findings of fact which were pertinent both to a private life claim under the Rules, and an Article 8 claim outside the Rules. His findings included the following: (a) The appellant's application of 2009 did not

mention that he had been working illegally; (b) Both the appellant and his wife were aware that the refusal letter of 2 March 2010 made it clear that there was no right of appeal; (c) While he accepted that Mr Wainwright had told the appellant and his wife that an appeal would be lodged, over the next five years the appellant had taken no further action to regularise his position, including chasing Mr Wainwright for evidence of progress in the appeal; (d) The appellant appeared to have fallen out with the church referred to in the 2009 application, and had set up another church (one of the first black churches in Maidenhead) which appeared to be a source of income, but he had not declared any income to HMRC; (e) The appellant had produced statements from various members of the Church, but none of them (save his wife) had attended the hearing and therefore were not available for cross-examination, and it was not clear whether or not they knew the appellant's "real situation."; (f) The appellant claimed to be a man of integrity and faith, and a father to his community, yet he took no action to support his own family in Zimbabwe, who were poor; (g) The appellant had been very unwell, but the medical evidence was that he had made a good recovery and medical assistance was available in Zimbabwe; and (h) The appellant was highly regarded by his community, and his dedicated congregation could support him if he had to return to Zimbabwe.

17. The Judge concluded, at paragraph [45], that while it would not be easy for the appellant and his wife to return to Zimbabwe, he did not consider that there would be very significant obstacles to the appellant's integration into Zimbabwe. At paragraph [46], he said that he was now turning to Article 8 ECHR and "*exceptional circumstances*".
18. At paragraph [47], he referred to **Gulshan [2013] UKUT 640 (IAC)**, where the Tribunal said that, after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
19. At paragraph [48], the Judge observed that the appellant failed to meet the requirements of the Rules for the reasons set out above, and noted the submission by Mr Holt that there were no compelling circumstances in the present case that warranted a consideration of Article 8 outside the Rules.
20. At paragraph [49], the Judge held that he was required to consider section 117B of the 2002 Act. He observed that in the appellant's case he had worked illegally, not paid tax and had been a burden on the state, "*most unfortunately due to his recent medical problems.*"
21. He set out the five-point **Razgar** test at paragraph [50], and at paragraph [51] he said: "*The Appellant has been in the UK for 16 years without leave. I accept that he has made friends, set up and is the pastor of a church. I acknowledge that the letters in support give testimony to his character and skills.*"
22. At paragraph [52], the Judge continued: "*I am of course bound to take into account all the circumstances of this case in assessing the proportionality of his removal and I am aware that there is a public interest in the maintenance of immigration control. The appellant has*

*remained in the UK illegally for many years. Whilst I note his role in the church, he may continue to enjoy a religious life in Zimbabwe and his experience and qualifications gained in the UK might be of assistance to him there. I find that there are no compelling circumstances that render the Appellant's removal disproportionate to the need for effective immigration control."*

### **The Hearing in the Upper Tribunal**

23. At the hearing before me to determine whether an error of law was made out, Mr Mackenzie developed the arguments advanced in his grounds of appeal. Mr Melvin, in reply, adhered to his Rule 24 response that the First-tier Tribunal Judge had directed himself appropriately, and no error of law was made out.

### **Discussion**

#### *Ground 1*

24. The Judge made inappropriate reference to the **Gulshan** threshold test, which is no longer good law. The test was disapproved by Aikens LJ in the Court of Appeal in **MM (Lebanon) -v- SSHD** where he observed: *"I cannot see much utility in imposing this further, intermediary, test."*
25. However, I do not consider that the Judge's misdirection was material. Firstly, he correctly identified in paragraph [46] that the core issue in the Article 8 claim was whether there were exceptional circumstances. In **TZ (Pakistan) and Another -v- SSHD [2018] EWCA Civ 1109**, Sir Ernest Ryder, Senior President, said as follows: *"24. The Secretary of State's instructions to decision-makers recognise there are circumstances outside the Rules in which it is necessary to grant leave to remain to avoid a breach of Article 8. The Secretary of State's policies are that such leave should only be granted where exceptional circumstances apply, i.e. circumstances in which refusal would result in unjustifiably harsh consequences for the person concerned. The legality of this policy and the tests that are articulated were accepted in Agyarko (see [19] and [48]). 25. The settled jurisprudence of the ECtHR is that it is likely to be only in an exceptional case that Article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the UK at a time when his or her immigration status is precarious ..."*
26. Secondly, the Judge did not actually apply the **Gulshan** test so as to commit the cardinal error of failing thereby to undertake the mandatory balancing exercise. The Judge noted Mr Holt's submission that there were no compelling circumstances in the appellant's case that warranted consideration of an Article 8 claim outside the Rules, but he clearly rejected this submission: firstly, by going on to remind himself of the need to address section 117B of the 2002 Act; and, secondly, by postulating and applying the five-point **Razgar** test.
27. Thirdly, it is clear from the Judge's findings at paragraph [51] and [52] that he rightly recognised that the proportionality assessment should not be limited to the considerations set out in section 117B of the 2002 Act, and that he was bound to take

into account “*all the circumstances of this case*” in assessing the proportionality of the appellant’s removal.

28. For the reasons above, there was no error of law as asserted in Ground 1.

### Ground 2

29. It is not the case that the Judge made no mention of the appellant’s medical problems in his assessment of proportionality. The Judge mentioned the appellant’s medical problems at paragraph [49], where he observed that the appellant had been a burden on the state, “*most unfortunately due to his recent medical problems.*” The Judge was not bound to give weight to the appellant’s medical problems as a factor which militated against his removal. The Judge summarised the appellant’s medical history at paragraph [40], and thus he gave adequate reasons for his conclusion at paragraph [43] that, while he had been very unwell, the medical evidence was that he had made a good recovery. Mr Mackenzie’s argument to the contrary is no more than an expression of disagreement with a finding that was clearly open to the Judge on the medical evidence which he had reviewed at paragraph [40]. The appellant had a background of HIV since about 2006, but he had not been treated for this condition until 2016. He had responded well to treatment, and he had been discharged from hospital. He was still taking painkillers and anti-retroviral drugs, but he had made a good recovery in comparison to his very poor state of health during the period 2016 to 2017. Accordingly, for the reasons given above, Ground 2 is not made out.

### Ground 3

30. In his proportionality assessment, the Judge acknowledged that the appellant had set up a church of which he was the pastor, and that the letters of support from his congregation testified to his character and skills. It was not erroneous in law for the Judge not to find that the appellant’s relationship with his congregation reduced the public interest in his removal. It would have been open to him to do so, following **UE (Nigeria)**. But that case is not authority for the proposition that the Judge was obliged to hold that the public interest in the appellant’s removal was thereby diminished.
31. As was held by the Court of Appeal at paragraph [28] of **TK**, the consideration of Article 8 outside the Rules is a proportionality evaluation involving a balance of public interest factors, and some factors are heavily weighted - the most obvious example being the public policy in immigration control. The weight to be applied to the public interest depends upon “*the legislative and factual context.*” It was open to the Judge to attach greater weight to the public interest in the maintenance of firm and effective immigration controls and the protection of the country’s economic wellbeing than to the public interest in the appellant continuing to serve his local congregation as the pastor of the church which he had set up illegally (in that he was not lawfully present in the UK with permission to work), and from which he was deriving an income and/or benefits in kind upon which he was not paying tax. Accordingly, for the reasons given above, Ground 3 is not made out.

**Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date 2 September 2018

Judge Monson

Deputy Upper Tribunal Judge