



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

Appeal Number: HU/13218/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 7 March 2019**

**Decision & Reasons Promulgated
On 20 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GT

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer.

For the Respondent: Ms L Longhurst-Woods, counsel.

DECISION AND REASONS

An order has been made under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead to the appellant being identified. Failure to comply with this order could lead to a contempt of court.

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal issued on 16 October 2018 allowing an appeal by the applicant on article 8 grounds against the respondent's decision of 8 June

2018 refusing her further leave to remain. In this decision, I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background.

2. The appellant is a citizen of Cameroon born on 6 February 1987. She first arrived in the UK on 13 June 2010 as a Tier 4 student with leave until 30 June 2011. Her leave to remain in this capacity was extended to 23 April 2012 and she then obtained leave to remain as a Tier 1 (Post-Study Work) migrant valid until 17 August 2014. She was later granted further leave to remain as a Tier 1 (Entrepreneur) migrant valid until 4 December 2017. On 30 November 2016 she made a human rights claim on the basis of her private and family life with her son, born on 4 August 2016, and the fact that she was receiving medical treatment in the UK.
3. The respondent found that the appellant could not meet the requirements of Appendix FM nor the requirements of EX.1 in respect of her relationship with her son. The appellant also failed to meet the requirements of para 276ADE(1) of the Rules as there would be no very significant obstacles to her reintegrating into Cameroon where she had lived for the majority of her life. In respect of her medical condition, treatment was available in Cameroon. She could not meet the requirements of article 3 nor could she succeed under article 8.
4. The appellant appealed against this decision relying primarily on article 8 and, in particular, on the best interests of her son and the fact that she was receiving ongoing treatment for cancer in the UK which could not be obtained in Cameroon.

The Hearing before the First-tier Tribunal.

5. At the hearing before the First-tier Tribunal, the appellant confirmed that her husband had left the UK in February 2015, returning voluntarily to avoid a one-year ban if he remained in the UK without leave. She had met her husband in the UK where he was also studying. She produced evidence relating to the treatment for cancer she has been receiving in the UK and letters from doctors in Cameroon about the availability of treatment there. She has set up her own accountancy business but now has to work from home due to her medical condition. She accepted that she could not meet the requirements for further leave to remain as a Tier 1 Entrepreneur.
6. The judge accepted the appellant's evidence about her business in the UK and that she had made the present application because she could not meet the requirements of the Rules for further leave in view of her medical condition. He summarised her medical condition in [18] of his decision. The appellant had undergone surgery for cysts in February 2015 and had later been diagnosed with breast cancer. She had surgery in February 2017 and was undergoing continuing tests and treatment. She

also suffered from a cardiac condition and had a number of medical appointments booked for 2018 and into 2019.

7. Her husband had obtained a number of medical reports confirming that her specific treatment was not available in Cameroon and that she should be allowed to be treated in the UK throughout the whole of her treatment programme [19]. The judge referred to objective evidence that medical facilities in Cameroon were poor and for serious medical treatment, medical evacuation to the UK or South Africa would be necessary. There was also evidence that the treatment of breast cancer was generally unsuccessful in Cameroon due to the unavailability of drugs [20].
8. The judge accepted the respondent's submission that the appellant could not meet the high threshold under article 3 but said that he was wholly persuaded for a number of reasons that her claim should succeed under article 8 in respect of her family and private life because it would be wholly disproportionate for her to return to Cameroon [21]. These reasons set out in [22] are the uncontested desirability for her to remain for treatment in the UK for her cancer condition; the fact that she had set up a business in the UK which was previously sufficient to grant her Tier 1 (Entrepreneur) status and the only reason for that status not being extended was due to her limited ability to work as result of her medical condition and the fact that she had been in the UK for eight years with valid leave.
9. The judge accepted that in theory she and her son could return to Cameroon and join her husband there, but it was his intention to make a further application to join his family in the UK [22]. He did not accept that there were very significant obstacles to her returning to Cameroon but did accept that it would be a breach of article 8 rights if she was required to return [23].

The Grounds of Appeal and Submissions.

10. In the grounds of appeal it is argued that the judge failed to give adequate reasons for his conclusion that removal would lead to a disproportionate interference with the appellant's article 8 rights; there could be no interference with her family life given that she would be removed with a child to her country of nationality where her husband was residing; he had failed to note or apply the leading case law on medical issues within article 8 and in particular Akhulu (health claim: ECHR article 8) [2013] UKUT 00400 (IAC); he had failed to consider whether this was one of the "very few rare cases" where article 8 might be engaged in a health case; he had failed to explain why her husband's intention to return to the UK made any material difference to the appellant's intended removal; whilst the judge might have had sympathy for the appellant's difficulties in maintaining her business at the desired level due to a medical condition, many individuals through no fault of their own likewise failed to achieve their desired income and the judge did not expressly deal with any of the factors set out in s.117B of the 2002 Act when there was a query whether those set out in

subsections (1)-(5) would positively enhance the appellant's case. Finally, the respondent submitted that the judge had failed to deal adequately with the countervailing public interest factors in the proportionality assessment.

11. Ms Isherwood adopted the grounds, pointing out that the judge had made a specific finding that there would be no significant obstacles to the appellant returning to Cameroon and that she was unable to reach the high threshold under article 3. This was not a case where there was no treatment available in Cameroon and could not be categorised as one of those very rare cases where an appeal which failed under article 3 could succeed under article 8. She argued that there had been no adequate, if any, consideration of the public interest when assessing proportionality.
12. Ms Longhurst-Woods adopted her amended reply dated 6 March 2019. She submitted that this was not a case about disparity of treatment but rather a lack of the specific treatment the appellant was receiving in the UK. She had been lawfully in the UK when she was diagnosed with her illness. There was no reason to believe that the judge had not taken into account the factors listed in s. 117B. She submitted this was a case where there were exceptional circumstances which would justify a grant of leave under article 8 and that the judge taken all relevant matters into account and reached a decision properly open to him.

Assessment of the Issues.

13. I must assess is whether the judge erred in law such that the decision should be set aside. I am satisfied that the judge has for the following reasons. It is common ground that the appellant could not meet the requirements of the Rules for further leave to remain. The proper approach when assessing article 8 in these circumstances was considered by the Supreme Court in Hesham Ali [2016] UKSC 60 where the Court accepted that a failure to meet the requirements of the Rules did not exclude the possibility of succeeding under article 8 but held that the policies adopted by the Respondent and given effect in the Rules were relevant and important considerations when determining appeals on Convention grounds because they reflected the general public interest made by the responsible minister and endorsed by Parliament.
14. The approach involved a consideration of whether there were exceptional circumstances requiring further consideration outside the Rules, an approach now endorsed by the amendment to the Rules in GEN 3.2 setting out the criteria of whether there were exceptional circumstances which would render a refusal of leave unjustifiably harsh for an applicant, their partner or a child.
15. I am not satisfied that the judge approached the assessment of article 8 on this basis. His assessment was in substance a freestanding assessment outside the context of the statutory scheme: see the Senior

President at [62] of Secretary of State v SC (Jamaica) [2017] EWCA Civ 2112.

16. Further, whilst the judge set out the reasons for reaching his conclusions in [22], he has nowhere referred specifically to the public interest considerations either generally or as set out in s.117B which must be taken into account into account. Therefore, the judge failed to approach the assessment of article 8 in accordance with the guidance in the Rules and in the judgments of the Supreme Court and in consequence he failed adequately to take into account the public interest factors to be set against the nature and extent of the interference with the appellant's family and private life.
17. I am also not satisfied that the judge has taken into account the jurisprudence relating to the assessment of medical issues under article 8. He has not considered in accordance with Akhulu whether the appellant's particular circumstances could be categorised as one of the very few rare cases which could lead to a grant of leave under article 8 nor, perhaps more to the point, did he take account of the judgment of the Court of Appeal in GS (India) the Secretary of State [2015] EWCA Civ 40 which made it clear that if article 3 could not be met on medical grounds, article 8 would not succeed unless there was some separate or additional factual element bringing the case within article 8: see Underhill LJ at para 111 of that judgment.
18. For these reasons I am satisfied that the judge has erred in law such that the decision should be set aside. Ms Longhurst-Wood argued that in these circumstances the proper course would be for the appeal to be remitted to the First-tier Tribunal for a full re-hearing when fresh evidence could be adduced on the issues of the medical treatment being received by the appellant and on the treatment available in Cameroon. Ms Isherwood did not seek to make any further submissions on the issue of whether the appeal should be remitted or retained in the Upper Tribunal.
19. I am satisfied that the proper course is for the appeal to be remitted for a full rehearing before the First-tier Tribunal. There is nothing in the present evidence to suggest that an appeal has any prospect of success under article 3 or under para 276ADE but there is an arguable case under article 8 which needs to be properly explored before the First-tier Tribunal and the appellant also seeks to produce further evidence including medical evidence. It will be for the First-tier Tribunal to decide what, if any, further directions are appropriate.

Decision.

20. The First-tier Tribunal erred in law such that the decision is set aside. The appeal is remitted to the First-tier Tribunal for a full rehearing before a different judge.

21. In the light of the issues raised in this appeal about the appellant's health, I was asked to make an anonymity order. I am satisfied that this is a proper case for an order to be made under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and I make an order prohibiting the disclosure or publication of any matter likely to lead to the appellant being identified.

Signed: H J E Latter

Dated: 14 March 2019

Deputy Upper Tribunal Judge Latter