



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/13803 /2015

THE IMMIGRATION ACTS

Heard at Field House  
On 7 April 2017

Determination Promulgated  
On 9 May 2017

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

KANGWA LAURA MUBANGA  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Solomon of Counsel, instructed by M A Solicitors  
For the Respondent: Mr K Norton, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Birk to dismiss her human rights appeal on 19 October 2016. She is a national of Zambia born on 2 March 1982 who entered the UK as a visitor. Two previous article 8 applications were refused, one with an appeal which was dismissed, and one with no right of appeal. She relies on family life with a British national, Mr Bland. She has a child from a previous relationship and was expecting a baby with her current partner at the date of the hearing. That child was born shortly thereafter.

2. Permission to appeal was granted by First-tier Tribunal Adio on 17 February 2017 on the basis that the judge arguably erred in assessing the mental health facilities (for the appellant's partner) in Zambia and proceeded on the basis that his mental health problems were a past rather than an on-going state of affairs.

### **The Hearing**

3. At the hearing on 7 April 2017, I heard submissions from the parties. The appellant was present.
4. Mr Solomon relied upon his grounds. He submitted that there had been a flawed consideration of the medical evidence by the judge who, at paragraph 17, had referred to Mr Bland's health issues as being in the past when they were ongoing and he remained on medication and under care in the community. He submitted that error had infected her findings on the availability of medical facilities for Mr Bland in Zambia. Having found that the facilities were poor, the judge then found that Mr Bland could receive treatment. There had been no consideration of the fact that his psychotic episode had been triggered by stress and that relocation to Zambia would be extremely stressful.
5. Mr Solomon further submitted that the judge had failed to take account of the documentary evidence on the discrimination against individuals with health issues looking for employment. Both the appellant and Mr Bland fell into this category. The discrimination against them and difficulties in finding employment would impact on their ability to relocate. He submitted that the best interests of the appellant's child had not been properly considered and there was no consideration of the part Mr Bland played in her life, having been there for her since she was a few months old. Crucial aspects of the evidence had been disregarded when the assessment was undertaken.
6. Mr Solomon submitted that the judge had also failed to take account of the delay in the enforcement action taken by the respondent. That reduced the weight to be given to the public interest in removal. The Chikwamba point had not been addressed either although it was argued in the skeleton argument.
7. Mr Norton responded. He submitted that the appellant had to show there would be insurmountable obstacles to the continuation of family life overseas. He submitted that in assessing the evidence regarding Mr Bland's illness, the judge had properly summarised this condition and treatment at paragraph 17. Mr Bland had been diagnosed with depression and autism and Asperger's syndrome had been ruled out. He no longer required specialist or rare medication and had returned to work on a phased basis. Save for medication and health care

monitoring, there was no definitive diagnosis as to future mental healthcare. The judge could not speculate and had to make a decision on the available evidence. She found that he was on the slow road to recovery. That was a fair summation of the evidence. The judge also found that Mr Bland was not in need of primary health care and that he would be able to access secondary or tertiary care.

8. Mr Norton submitted that the judge had considered the best interests of the appellant's daughter adequately.
9. With regard to the Chikwamba point, the sponsor had demonstrated a skill in employment and could make use of those skills in Zambia. It was not sufficient to argue that he had the potential to earn £50,000 per annum. He had been working full time when he earned that income but was now down to 20 hours a week and so would be earning less. There had been no delay in the consideration of the application. The appellant had been required to leave in 2006 when she lost her appeal. The respondent's failure to enforce her removal had only benefited the appellant. She should not be rewarded for overstaying. Her relationship was formed at a precarious period and even if there had been specific consideration of 117B, no other outcome would have been possible. The appeal should be dismissed.
10. In response Mr Solomon submitted that Mr Bland suffered from an ongoing disorder and was on anti-psychotic drugs. It was necessary to consider whether he would be able to access health care in Zambia as a foreign national. This was an argument raised on behalf of the appellant but was not considered by the judge. Delay, in general, was a pertinent matter that required consideration. The precariousness of the appellant's stay was not a determinative factor but one of many issues that had to be considered.
11. That completed the submissions. At the conclusion of the hearing I reserved my determination which I now give.

### **Discussion and Findings**

12. In reaching my findings, I have taken careful note of all the submissions and the evidence relied on by the parties, whether or not it is specifically referred to in my determination.
13. Whilst I accept that the judge described Mr Bland as suffering from a mental illness at the start of the contentious paragraph 17, I accept Mr Solomon's submission that a full reading of that paragraph suggests that she considered that there was one psychotic episode in 2016, that his problems had since passed and that having returned to work, albeit part time, he was recovering. The difficulty is that the judge appears to have

related the condition to a past psychotic incident without appreciating that the situation is tenuous and could flare up again with stress. Mr Bland continues to be monitored and is still under supervision. Whilst it is true, as Mr Norton submitted, that the judge could not speculate on what the future may hold, she should have had regard to the fact that it was stress that caused the past episodes and that having to relocate to Zambia could well be a very stressful experience for Mr Bland. This had been argued before her.

14. Additionally, the judge failed, in my view, to have proper regard to whether Mr Bland would be able to access health care in Zambia. He is a British citizen and apart from the issue of whether he would be entitled to whatever care was available, there was no proper consideration of whether the care would be adequate for his needs, given that it was found to be extremely poor (at paragraph 18), and how this would impact on the ability of the family to relocate and continue their lives in Zambia. The evidence, in fact, indicates that there is a lack of provision for mental health at both primary and secondary levels (p. 4; ZAMPHOR report) and suggests that discrimination is a major issue against those who have health conditions (US State Department report). Both the appellant and Mr Bland fall into this category and so whilst the judge found that Mr Bland would be able to work and support the family, she did not consider the possibility that he may not be able to work at all, given his health and the stigma attached to those with mental health problems. Nor was there any consideration of whether it would be reasonable to expect Mr Bland, a British national with no links to Zambia, to move there. This is a particularly serious failing in the determination, given the present authorities on the matter.
15. There are also difficulties over the manner in which the judge considered the best interests of the appellant's daughter. Mr Bland has been part of her life since she was a few months old and yet there has been no consideration in the assessment of how a separation from the only father she has ever known (if Mr Bland did not choose to travel to Zambia) would impact upon her. Additionally, the judge failed to engage with section 117B or the arguments made with respect to the Chikwamba guidance and the matter of the delay in enforcement action.
16. Taken cumulatively, the judge's errors are such that I must set aside her decision. I do not preserve any findings. I note, however, that the respondent rightly conceded that the relationship is genuine and subsisting. Unless there are any developments which would undermine that concession, the appellant can assume that the next hearing shall proceed on that basis.
17. Mr Solomon asked that the matter be remitted back to the First-tier Tribunal for a fresh hearing if an error of law was found. I have

considered whether to keep the matter in the Upper Tribunal but given Mr Solomon's request and the fact that the matter shall have to be determined afresh on all matters, I accede to it.

**Decision**

18. The decision is set aside and shall be re-made at a future date by the First-tier Tribunal.

Signed

Upper Tribunal Judge Kekic

Date: 11 April 2017