Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03195/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 September 2020	
Further submissions 25 May 2021	**On 29 June 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

I G
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hone instructed by LS Legal Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of the respondent made on 10 December 2018 to refuse his human rights claim. His appeal against that decision was allowed by the First-tier Tribunal for the reasons given in a decision promulgated on 13 September 2019. For the reasons given in my decision of 2 March 2020, that decision was set aside with a direction that it should be re-made in the Upper Tribunal. A copy of my decision is attached to this decision.

Preliminary matters

2. For reasons which are unclear, my decision my decision following the hearing on 23 September 2020 was not promulgated. This only came to my notice on 18 May 2021. Mindful of the fact that the appellant's circumstances may well have changed in the intervening period, I considered it necessary in the interests of justice, to permit him to adduce further evidence as to his health and other circumstances and I issued directions to that effect, and that unless either party requested it, it would not be necessary for a further hearing.

3. The appellant has provided additional evidence in the form of further witness statements and medical evidence but has not requested a further hearing. The respondent has not served any evidence in response, nor has she served any further submissions although permitted to do so.

4. Given that much of the reasoning in this decision turns on the appellant's health, I am satisfied that it is in the interests of justice to anonymise him.

Introduction & Background

5. The appellant arrived in the United Kingdom in October 2002 with entry clearance as a Tier 4 (General) Student. Although his leave expired on 1 March 2003 he remained in this country after an unsuccessful application to extend his leave which was refused on 14 July 2003. The appellant met his partner, ER, in 2003. She was at the time estranged from her husband and eventually she divorced him, marrying the appellant on 6 February 2016.

6. ER is a British citizen and has been since 2015. She is originally from Georgia but, as a consequence of acquiring British citizenship, had to renounce her citizenship of Georgia. The part of Georgia from which she comes is now under occupation.

7. The appellant is financially entirely dependent on his wife and he looks after the home while she works as a full-time carer providing comprehensive services to one particular lady who requires full-time attention, her earnings exceeding £28,000 per annum.

8. Both the appellant and his partner have health difficulties. The appellant has recently had bladder cancer which required an operation to remove tumours which although non-muscle invasive were of a high grade. Further cystoscopies followed and he has since received BCG therapy every three months or so.

9. ER has had surgery for the removal of a fibroid and it appears will need further operations before she is able to undergo IVF treatment. This operation has been postponed due to the current COVID pandemic.

10. The appellant's case is that he would not be able to get the necessary BCG treatment in Georgia except by paying money; and, that the vials of BCG would need to be obtained from outside Georgia.

11. The appellant's case is that he fulfils the requirements of EX.1. on the basis that there would be insurmountable obstacles to him and his wife, bearing in mind their circumstances and health needs, in maintaining their family life in Georgia. It is also his case that he fulfils the requirements of paragraph 276ADE(1)(vi) and, that it would be disproportionate to expect him to return to Georgia to make an application to return to the United Kingdom. It is in particular argued that the applicant's wife would not be able to obtain the IVF treatment in Georgia and that he himself would not be able to get the correct treatment which is required were he to return to Georgia even for a short period. It is also argued that there would be little point served in requiring him to return to Georgia given that the requirements of Appendix FM are met.

12. The respondent's case is that the appellant does not meet the requirements of Appendix FM, EX.1., or paragraph 276ADE(1)(vi) on the basis that any obstacles could be overcome; that there is insufficient evidence to show that there would be very significant obstacles to reintegration for the appellant given that he had lived the greater part of his life in Georgia; and, that removal would be proportionate, bearing in mind his long period of overstaying and on the basis of the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002.

The Hearing on 23 September 2020

13. I had the following before me:

    (1) Respondent's bundle.

    (2) Appellant's bundle.

    (3) Appellant's supplementary bundle.

    (4) Appellant's second supplementary bundle.

    (5) Rule 24 reply.

    (6) Home Office's "Family policy: Family life (as a partner or parent), family life in exceptional circumstances.

    (7) Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444.

    (8) Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129.

    (9) Skeleton argument from Mr Hone.

14. In addition to the above material which contains witness statements from the appellant and his wife, I heard oral evidence from both of them.

15. The appellant adopted his witness statements adding that he had surgery for bladder cancer last year and will require BCG treatment for his bladder cancer every three to six months for the next three years.

16. In cross-examination the appellant said that he had had a recent meeting with his doctor who said he would need to return for further treatment in three weeks. He did not have a letter to confirm this. He said that there had been delays due to

COVID and that he is at high risk but that the treatment had been urgent. It was put to him that if that was so he would have written confirmation of that. He said he was still waiting for a letter sent to him following the consultation last week.

17. The appellant said he could not go back to Georgia and apply to come back, that he would be risking his life, and that BCG treatment was not available in Georgia. Asked if he had spoken to a doctor in Georgia about that, he said that he had obtained a letter from somebody who had been in a similar position to him in Georgia who had had difficulty n obtaining the BCG treatment, it being quite expensive, approximately US$300 to US$400 and that he had had to obtain that from outside Georgia and bring it in with him.

18. The appellant said that he thought it would be now more difficult to go back to Georgia and apply to return due to COVID-19 and at the same time he would be at risk of not getting treatment which would put his life at risk. He said that as he had had cancer he was at greater risk of COVID-19 but it was put to him that if that was so he would have received a letter from his doctor.

19. In re-examination the appellant said he had not received any chemotherapy.

20. I then heard evidence from the appellant's wife who adopted her witness statement adding that her operation had been postponed owing to COVID, that it was important for her to get the operation as otherwise she would not be able to undergo IVF and, at 43, it was urgent.

21. Asked about her husband's treatment she said that he still needed BCG treatment and would require a further cystoscopy.

22. In cross-examination the appellant's wife said that she would still be able to enter Georgia despite no longer being a citizen but that she would not be able to earn anything like what she earns now even were she able to get a job. She said that not being a citizen might mean that there were certain things she had to pay for and that she might have difficulty in applying for certain jobs. She said it would not be possible for her to support her husband were he to go to Georgia as she is self-employed and could not take a holiday even to visit him.

23. Mr Lindsay relied on the refusal letter submitting that the appellant and his wife could return to Georgia together or that he could return to make an application for entry clearance. He submitted further that it had not been shown that the appellant could not access the relevant medical treatment given the lack of detail and the absence of any detail of expenses and resources available to him and his partner; and, the fact that they would have less money in Georgia was not an insurmountable obstacle. It should be noted that family life had developed in this case when the appellant's presence here was precarious and unlawful.

24. Mr Lindsay submitted also that there was a lack of evidence regarding the medical condition and ongoing treatment.

25. Turning to Chikwamba, Mr Lindsay relied on Younas but that it was not necessarily "very likely" that the application would succeed, not least as the applicant had a poor immigration history having remained here unlawfully for some seventeen to eighteen years. He submitted that as was established in Younas at point 2 this should be looked at in the real world and the likely situation was that the appellant would be separated from his wife for only a matter of a few months, a scenario envisaged within the policy document at page 53.

26. Mr Hone relied on his skeleton argument submitting that neither the appellant nor his wife would be able to return and obtain medical treatment. He submitted further that in current circumstances the delay may well be indefinite and thus amounts to an insurmountable obstacle given both the treatment necessary and difficulties in obtaining entry clearance to return in current circumstances. He submitted further that in any event the appellant's wife was entitled to treatment in the United Kingdom as a citizen.

27. Mr Hone submitted it would be not be possible for the appellant's wife to go to Georgia. He submitted that viewed as a whole removal would in this case be disproportionate notwithstanding Section 117B and that were the appellant's wife to go to Georgia she would not be able to sponsor him to come back that she would lose her job in the United Kingdom.

28. Mr Hone submitted that given current circumstances owing to the COVID pandemic, a different view ought to be taken to the possibility of return.

The Law

29. Section 117B of the 2002 Act provides, so far as is relevant:

> **117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

…

30. Paragraph 276ADE(1)(vi) of the Immigration Rules provides, so far as is relevant:

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> …
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

31. Paragraphs EX.1(b) and EX.2 of Appendix FM of the Immigration Rules provide, so far as is relevant:

> EX.1. This paragraph applies if
>
> (a)
>
> …
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. 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.

32. The documentary evidence was, and is, lacking financial evidence to cover the current resources of the appellant and his wife. For example, I do not have copies of recent bank statements or a schedule of income and expenditure indicating to what extent there is or is not any spare income or savings that could be used to support the appellant in Georgia. That was the case at the hearing and now.

33. There is, however, significantly more medical evidence. I am satisfied from that, and from the additional witness statements, that the appellant continues to receive cancer treatment every three months. That is due to a diagnosis of bladder cancer, (high-

grade pT1a Tcc- Transitional cell carcinoma) and that there is a high chance of recurrence. I also accept that since the last hearing the appellant has had to undergo a cystoscopy in which another growth was discovered and removed, and that he is to undergo another cystoscopy in June. That is in addition to the regular BCG immunotherapy treatment. All of this is confirmed by letters and other documents from Kingston Hospital.

34. I have no reason to doubt that the appellant believes he is at high risk or that, owing to the treatment he receives, he cannot be vaccinated against COVID. He is understandably very anxious and is, as indeed is his wife, anxious as a result and I have no reason to doubt in the light of the evidence of treatment so far that the appellant will need to undergo BCG treatment on a regular basis every 3 to 6 months. What I do not have is any assessment of the risks that would flow from not getting treatment but I note that the tumour removed was "high grade" and I am satisfied by the evidence that on the balance of probabilities that the BCG treatment is necessary to prevent further cancer. I take note of the fact that his condition was seen as sufficiently serious to require continuing treatment despite COVID.

35. I take judicial note of the fact that those undergoing chemotherapy and other therapies for cancer are deemed by the NHS to be at high risk for COVID and that this would impact on the appellant returning to Georgia.

36. There is limited information about the availability of BCG treatment for bladder cancer in Georgia, the only evidence being from somebody who had undergone that treatment indicating it was expensive ($300 to $400 per vial), but there is no letter from any doctor in Georgia setting out when and where the treatment could be administered, the cost of a course of treatment or whether the drugs had to be imported and if there were any difficulties in doing so at present. It may well be that owing to the COVID 19 pandemic that it is more difficult to get treatment in Georgia, but there is simply no evidence about this. That said, there is no evidence either from the respondent that this treatment is available, and I note that the appellant has contacted hospitals in Georgia to the effect that the treatment is not available, and that it is now no longer possible to import medical supplies.

37. There are no documents before me relating to any travel restrictions in and out of Georgia that are in place. I do not know what restrictions there would be on the appellant on return, or if his wife as a non-citizen would be permitted to enter. There may be some, there may be none. Equally, I have no evidence about current wait times to obtain entry clearance to the United Kingdom or even whether the relevant office is open.

38. That said, I have no reason to doubt the appellant's account that he has no resources on which to rely in Georgia and that his parents are self-isolating meaning that he could not stay with them. They are elderly and his health has been compromised and I have no doubt that his continued relatively good health is dependent on regular diagnostic checks undertaken by his treating physicians and regular immunotherapy.

39. I find that, given his health, the appellant would have to self-isolate and would not be able to work. I accept he could not be accommodated by his family, and that he would have to pay for that, and for everything else through his wife's resources. But it would not be integration if he were to live isolated, and without family; and, his health would deteriorate. In the circumstances, and particular factual matrix of this case, I am satisfied that he meets the requirements of paragraph 276 ADE(1)(vi).

40. I consider that, given that the appellant's wife is self-employed and would in effect have to give up her job as well as giving up the opportunity of getting treatment in the United Kingdom for an unknown period, that it would be unreasonable in current circumstances to require her to go to Georgia. For these reasons, and given the factors identified above, I find that the appellant's health and need for treatment he cannot realistically obtain in the United Kingdom, that there would be insurmountable obstacles to family life being conducted in Georgia and I am satisfied that the requirements of paragraphs EX.1 and EX.2. are met.

41. For these reasons, I conclude that the appellant meets the requirements of the Immigration Rules. Following the principles set out in TZ(Pakistan) and PG (India) [2018] EWCA Civ 1109, I am satisfied that the decision to refuse leave is a disproportionate breach of the appellant's article 8 rights and I allow the appeal on that basis.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I re-make the appeal by allowing the appeal on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 24 June 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03195/2019

THE IMMIGRATION ACTS

Heard at Field House
On 25 February 2020

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

I G
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr B Hone of Counsel instructed by LS Legal Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Dineen promulgated on 13 September 2019 allowing the appeal of I G against a decision of the Secretary of State to refuse his human rights claim. That in turn was a claim made on the basis of his family and private life with his partner who is a British citizen although she was originally from Georgia.

2. The respondent's case is that the difficulties incurred by requiring him or his wife to go and live in Georgia would meet the requirements of paragraph EX.1 of Appendix FM in that there would be very significant difficulties which they either singularly or together would face in continuing their family life together outside the United Kingdom in Georgia which could not be overcome or would entail very serious hardship for him and his partner this being primarily first, that she works here and would lose that employment, second, that they are undergoing IVF, third, that the respondent's wife had had health difficulties and that taken together this would meet the requirement in EX.2. Further it is argued that he would meet the high threshold of very significant obstacles to the integration set out in paragraph 276ADE(1)(vi) and in the alternative that there are exceptional circumstances such that requiring him to leave the United Kingdom would be disproportionate taking into account Section 117B of the 2002 Act. Given that, primarily he meets all the requirements of the Immigration Rules save for the fact he does not have leave to remain.

3. The judge heard evidence from the respondent and his partner and concluded at paragraph [34] that in all the circumstances the requirements of EX.2 and consequently EX.1(b) of Appendix FM were met. Second, that he did not fulfil the requirements of paragraph 276ADE(1)(vi) and third, were it necessary that having had regard to Section 117B of the 2002 Act in particular strong public interest in the maintenance of effective immigration control, that the interference of family life occasioned by the decision would not be proportionate to the legitimate aims and for these reasons allowed the appeal.

4. The Secretary of State sought permission to appeal on the grounds that the decision involved the making of a material misdirection of law with regard to the insurmountable obstacles in that the circumstances found by the judge could not amount to insurmountable obstacles in that they were not ones which could not be overcome or would entail very serious hardship. She submitted that none of the factors would amount to severe hardship that could not be overcome second, it is argued that the judge failed to explicitly consider the requirements of Section 117B of the 2002 Act in finding that a return would be disproportionate.

5. I accept that there are a number of findings of fact made by the judge with regard to IVF treatment and regarding the position of the respondent's partner. There is a recitation of the health difficulties also but I conclude that what there is not in this case is any proper focusing on why the specific circumstances which would occur here would amount to insurmountable obstacles or the test or very significant difficulties. That is a high threshold and there is merit in the submission that the sole reason that appears to have engaged the judge's consideration is at [19] which is to do with the health difficulties. Whilst it is clear that he does note that she would not be able to work, there is no consideration why either singularly or cumulatively these would meet the high threshold established by EX.1 and EX2. Further it is difficult to see how in assessing why EX.1 is met there has been any attempt to engage whether the respondent could go back to Georgia and apply to return. Accordingly, I am satisfied that the judge's findings with respect to EX.1 and EX.2 are not sustainable in

that they are not sufficiently reasoned. I consider also that the judge's analysis of Article 8 outside the Rules is unsustainable.

6. Whilst Mr Hone has sought to persuade me that this is a case in which the case law following on from **Chikwamba** would be applicable in that in this case there would be no real or appropriate reason for requiring the appellant to go back to Georgia to make an application to return because all the requirements of the Immigration Rules were met, I bear in mind two points. First, there has been a substantial period of remaining in the United Kingdom without leave there are no findings about that and equally as was clearly pointed out in her submissions there are no findings with regard to Section 117B as a whole, in particular the nature of the family life engaged in this case which was precarious. That is not to say that an appeal on this basis could not succeed but there is simply insufficient findings made by the judge which could permit a decision that removal is disproportionate to be sustained and accordingly for these reasons I set the decision aside.

7. The decision will be remade in the Upper Tribunal, it will be made on a date to be fixed because there will be as I understand it additional evidence to be put forward.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The decision will be remade in the Upper Tribunal

3. No anonymity direction is made.

Signed Date 2 March 2020

Upper Tribunal Judge Rintoul