Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/20113/2013
IA/20116/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 29th July 2014	**On 4th August 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A & C O

Respondents

For the Appellant: Mr Young, Senior Home Office Presenting Officer
For the Respondents: Mr H Ndubuisi, of Drummond Miller, Solicitors

An anonymity order applies

DETERMINATION AND REASONS

1. The parties are as described above, but this determination refers to them as they were in the First-tier Tribunal.

2. The appellants are citizens of Nigeria. They appealed to the First-tier Tribunal against the respondent's refusal of leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system (PBS) and as a dependant.

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3. By determination promulgated on 3rd February 2014 Judge D C Clapham SSC dismissed the appeals in so far as taken against refusal of the PBS applications. No issue is now taken in that respect.

4. At paragraphs 22 to 32 the judge rehearsed matters leading to the appeals being allowed under Article 8 of the ECHR. He did not cite the Immigration Rules related to family and private life. (The appellants did not apply under that aspect of the Rules, so there was no consideration of it in the decisions under appeal.) His decision is based on the medical condition of the appellants' child D, who has an overactive thyroid gland, requiring complex management. The judge considered that D's best interests would be served by his remaining in the UK and that while this was not a paramount consideration the proportionality balance was in favour of the appellants.

5. The SSHD appeals to the Upper Tribunal on these grounds:

> Failing to give reasons or adequate reasons for findings in a material matter
>
> …
>
> (b) The judge concludes pursuant to medical evidence that it would be in the best interests of … D … to remain in the UK and receive treatment for his overactive thyroid … The judge's findings fail to provide any conclusions on comparable care in Nigeria … The onus would be on the Appellants to substantiate that there is no provision available in Nigeria and that this would amount to something exceptional, i.e. 'very compelling' …
>
> (c) … In the absence of evidence to the contrary … the best interests of the Appellants' child can be realised in Nigeria with the support of his parents. ZH (Tanzania) [2011] UKSC 4 recognises that the child's best interests are served by having access to both parents … In the absence of evidence to the contrary it is submitted that D would be able to receive health care while this may not be of the same quality as can be expected in the UK this would not automatically amount to something exceptional. Zoumbas [2013] UKSC 74 makes plain at paragraph 24:
>
> *There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. We agree with Lady Dorrian's succinct summary of the position in para 18 of the Inner House's opinion.*
>
> (d) ... The findings of the judge failed to adequately established that there is insufficient provision in Nigeria, particularly in conjunction with … Zoumbas

> which holds that while health care might not be comparable this does not entitle a family to remain for such reasons.

6. In a Rule 24 response the appellants argue that the judge properly identified the public interest in immigration control, and gave proper reasons for his conclusion that this was a good arguable case, due to the health considerations of the child, for going outside the Rules. He reached a proportionality conclusion open to him, for clear and adequate reasons. The case did not rely upon comparison of medical facilities in the UK and Nigeria. There is no legal principle requiring the judge to determine that issue, on the authority of SQ [2013] EWCA Civ 1251 and AA [2014] CSIH 35.

7. Mr Young pointed out that the judge made no findings on medical care available to D in Nigeria. He said that it was for the appellants had to establish a case based on relative health care, and they failed to do so. It would have been within judicial knowledge that there is health provision to the level of medical schools and advanced hospitals in Nigeria. There was nothing before the First-tier Tribunal to indicate any lack of treatment. AA did not say that such comparison was irrelevant. Rather, it was crucial. Lady Clark, giving the opinion of the Court, said at paragraph 14:

> … this is a case in which it is strongly arguable that the necessity for medical treatment which is available in the UK and the seriousness of the complex cardiac condition of this very young child point to the best interests of the child to remain in the UK. However one interprets the evidence about available health care for the child in Pakistan, it seems plain that the health care available for the child in the UK is both certain and available …

8. And at paragraph 16:

> … there is a decision to be made about the best interests of the child in the circumstances where the treating doctor and Dr Jeffery both consider that this child with very serious and complicated heart defects who has planned treatment available in the UK will have a substantial threat to future health and survival if returned to Pakistan.

9. Mr Young turned to SQ, which at paragraph 1 opens with reference to health care available in Pakistan:

> … of a significantly lower quality than that which is available, and that which [the Appellant] has enjoyed, from the National Health Service here.

10. And at paragraph 27:

> On the one hand, MQ can pray in aid his lawful entry and status as a child with the protection of the ZH approach. On the other hand, he arrived with his serious medical conditions at an advanced stage and, although not an unlawful entrant, it will be relevant to consider whether his arrival here was a manifestation of ‘health tourism’ … this country is under no international obligation always to act as ‘the hospital of the world’. The difficult question is whether it would be disproportionate to remove this child in the light of all the evidence … including the medical evidence …

11. Mr Ndubuisi relied upon the Rule 24 response and said there was no error of law. The case involved no question of comparison of quality of treatment available in Nigeria and in the UK. The appellants had given evidence before the judge that treatment is available in Nigeria, but might be expensive. However, neither its availability nor its cost was relevant. AA at paragraph 14 was an authority that there is no need for a judge to embark on any comparison. SQ at paragraphs 24, 26 and 27 is to similar effect. Questions of comparable treatment are relevant only to Article 3 medical cases. In considering Article 8 and the best interests of the child, they have no part to play. Zoumbas was not a health case but on the general assessment of proportionality where the best interests of children are involved. The FtT judge correctly considered the seriousness of the child's condition and the continued stability of treatment available here, and needed to look no further. It might even be said that the judge did not go far enough in finding factors favourable to the appellants in the Article 8 balance. They have been here for some years and are properly entitled to treatment under the National Health Service. The determination should stand.

12. If the determination were to be set aside, Mr Ndubuisi did not seek a remit to the First-tier Tribunal. He would ask for admission only of further updating evidence regarding the child D's treatment in the UK.

13. The only potentially significant item is a letter from D's medical consultant dated 15th July 2014. This states that his disease is poorly controlled, and if it remains difficult to control with oral medication he would need to proceed with surgery to remove the thyroid gland, a complex procedure, the expertise to perform which safely is available in Edinburgh.

14. Mr Ndubuisi made it clear that the appellant did not offer to provide any further evidence about treatment in Nigeria because (a) it is conceded that treatment is available and (b) the matter is irrelevant.

15. Mr Young in response submitted that all the cases referred to, including Zoumbas, make it clear that relative health care is an issue which cannot be left out of consideration.

16. I reserved my determination.

17. This case turns on a straightforward point. The judge held (at least in effect), and the appellants continue to argue, that a case based on the best interests of a child may succeed by showing a continuing programme of health care in the UK, without reference to care available in the destination country.

18. The two sides rely on the same three cases for directly opposite propositions. Although Mr Ndubuisi reads them quite differently, I think they make it plain that while the tests for health cases are different in Article 3 and Article 8 cases, and the threshold is probably at its lowest in the case of a child, the relative availability of health care is *always*

relevant. To hold otherwise would be contrary to authority, and would have the absurd result that if a child has ongoing health care needs which are served in the UK, then he and his family have rights to remain notwithstanding availability of similar (or even better) care in the destination country.

19. The determination of the First-tier Tribunal errs in law, namely absence of any consideration of the issue of comparative health care. It has to be set aside and remade.

20. The Appellants acknowledge that they have no case under the Immigration Rules. They make no case that the consequences of removal will be significantly adverse either to D or to any other member of the family. Taking account of the best interests of the children (one of the younger siblings also has health problems, although not so serious) and treating those as a primary but not paramount consideration, there is nothing to show that the interests of the children will be adversely affected in any significant way by return with two caring parents in a stable family unit to Nigeria.

21. Removal is not in any way a disproportionate measure.

22. The determination of the First-tier Tribunal is set aside and the following decision is substituted: the appeal, as brought by the appellants to the First-tier Tribunal, is **dismissed on all available grounds**.

30 July 2014
Upper Tribunal Judge Macleman