Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02118/2014

THE IMMIGRATION ACTS

Heard at Field House
On 19th February 2015

Decision & Reasons Promulgated
On 11th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JANE UTUBOR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Avery, Home Office Presenting Officer
For the Respondent: Mr Willford, Counsel, for Duncan Lewis and Co, Solicitors, Harrow

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.

2. The Appellant is a citizen of Nigeria born on 5th April 1981. She appealed against the decision of the Respondent dated 26th March 2014 which was that the Appellant should be removed from the United Kingdom by way of directions following refusal of asylum. Her appeal is based on her rights under ECHR. The Grounds of Appeal do not contest the decision to refuse asylum as such. The appeal was heard by Judge of the First-tier Tribunal Camp on 23rd October 2014. The appeal was allowed on human rights grounds and on the basis of the Appellant's entitlement to humanitarian protection in a determination promulgated on 10th November 2014.

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3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Shimmin on 24th November 2014. The grounds of application are that the judge erred in making findings which were not based on an accurate picture of the medical situation facing the Appellant on return to Nigeria and in respect of Section 117B of Part 5A of the 2002 Act and the weight applied to the Appellant's private life including her ability to speak English and be financially independent. The grounds go on to state that the judge failed to apply the findings in **Akhalu [2013] UKUT 00400 (IAC)** in respect of the cost of healthcare in the UK. The permission states that it is arguable that the judge did not take into account and/or resolve certain conflicts of fact and opinion relating to the Appellant's medical condition and that it is arguable that the judge made a material misdirection of law, particularly in respect of Article 8.

4. The Presenting Officer submitted that the judge was wrong to allow the appeal under Articles 3 and 8.

5. He referred to the first ground of application and the medical report and submitted that the Respondent is challenging the judge's reasoning relating to Article 3. He submitted that there are issues relating to the diagnosis of the Appellant's medical condition. The medical report on more than one occasion states that the diagnosis of the Appellant's medical condition is not entirely clear and neither is the prognosis. He submitted that what is clear is that the judge found that the Appellant has a psychotic illness in spite of no formal diagnosis having been made. He submitted that the judge did not properly take into account the fact that there is no formal diagnosis and did not properly take into account the fact that the Appellant's condition is at present under control because of the medication she is taking. He submitted that it was put to the judge at the First-tier hearing that that particular medication is available in Nigeria.

6. The Presenting Officer referred to paragraphs 32 and 35 of the determination. He submitted that the judge has not properly addressed the facts before him when dealing with the Appellant's medical issues. The judge has made no mention of "reasonable likelihood" but has made an assessment based on supposition. He submitted that although the judge has referred to the cases of **N [2008] ECHR 453** and **D [1997] ECHR 25** he has not properly assessed their terms. He accepts that there is treatment for the Appellant's condition in Nigeria. He goes on to find that on the basis of her medical condition the Appellant does not cross the very stringent threshold for an Article 3 claim based solely on medical grounds but he states that most of the treatment for mental illness in Nigeria is provided by traditional and faith healers and this takes the Article 3 claim beyond a claim based on medical grounds alone. The judge has not taken into account the fact that there is official medical treatment available for the Appellant in Nigeria and the medication which she takes in the United Kingdom is available for her there. He submitted that the judge has speculated that the Appellant would be reliant on healers in Nigeria and that her mental health might lead to her being subjected to persecution because of attitudes in Nigeria to sufferers of mental health conditions. He submitted that there

is no evidence that the Appellant would be unable to get official treatment in Nigeria. It is clear from the objective evidence that this is available.

7. He submitted that the judge had no reason to suppose that her family in Nigeria would encourage the Appellant to use traditional medicine or would allow the Appellant to be subjected to ridicule because of her mental health. He submitted that the judge's finding is based on one medical report and one faith healer and he submitted that the judge should have made a finding as to the likelihood of the Appellant being able to get proper treatment for her mental health and whether her family would help her with this and would help her to access this treatment. He submitted that if the judge had properly considered this there was nothing before him to indicate that the Appellant would suffer ill-treatment to the threshold required by Article 3 if she is returned to Nigeria and he submitted that the judge's decision is unsustainable. He also submitted that the Article 3 threshold in this claim is very high as what the judge has to consider is what would happen to the Appellant in her home country.

8. The Presenting Officer then referred to the judge's approach to Section 117B of the 2002 Act in connection with Article 8. His Article 8 assessment starts at paragraph 36 of the determination. He submitted that at paragraph 47 the judge states

> "The question of weight given to the Appellant's private life has to be considered in the light of the statutory provision. However it must remain a matter for the Tribunal to determine how much weight constitutes 'little weight.'"

He submitted that what the judge appears to be doing is ignoring the statutory terms of Section 117B and is replacing it with his own ideas. He submitted that on this basis his decision must be flawed. He submitted that what the Tribunal has to do is look at all the factors in the round. He submitted that Section 117 is clear. That part of the Statute cannot be ignored. He submitted that as there is an error in the judge's Article 3 findings this error has resulted in an error in his Article 8 findings. He submitted that many of the judge's Article 8 findings are based on the medical treatment being given to the Appellant in the United Kingdom. He submitted that the Appellant cannot succeed in an Article 8 claim because she is getting better treatment in the United Kingdom than she may get in Nigeria. I was again referred to the said case of **Akhalu** and the Presenting Officer submitted that the judge's Article 8 argument is fundamentally flawed.

9. The Presenting Officer submitted that the argument put forward by the judge relating to Article 3 and the Appellant's medical treatment must fail and the fact that the Appellant might not be able to afford the available medication in Nigeria is not sufficient for the Appellant's claim to succeed. He submitted that the medical report helps the Appellant's claim very little.

10. The Appellant's representative made his submissions referring me to his written submissions.

11. With regard to Article 3 and the grounds, the representative submitted that the judge did not apply an incorrect test. The grounds assert that the judge erred because there was no firm diagnosis of the Appellant's condition but the doctor found that the Appellant has a psychotic illness. He submitted that the grounds state that the judge based his decision on the Appellant having been admitted to hospital in 2010 but that is not the case. The judge made his decision on the basis of a psychiatric report which states clearly that the Appellant has a psychotic illness. This is a formal diagnosis. He submitted that what the doctor states in the report is that there is no formal diagnosis in his possession but that does not stop him from finding that the Appellant has a primary psychotic illness. The representative submitted that the Appellant has medication for that illness. He submitted that the judge accepts that this not a case which can succeed based purely on this illness under Article 3. The judge accepts that this would not meet the required threshold but the judge makes his Article 3 finding on the basis of the treatment which people with mental illnesses in Nigeria are subjected to. He submitted that based on what was before the judge he was entitled to come to his decision.

12. I was referred to paragraph 32 of the determination in which the judge refers to an extract from a journal dated in 2013 and a report from World Psychiatry dated in 2003. He submitted that the judge took these into account and the judge's finding on Article 3 is not on the basis of a lack of healthcare in Nigeria but because the judge finds it likely that the Appellant will be subjected to the quackery which he details in said paragraph 32. He submitted that at paragraph 34 of the determination the judge finds that the Appellant would be at real risk of such treatment in Nigeria and he again submitted that the judge is not using an incorrect test. He submitted that as the Appellant was found to suffer from a primary psychotic illness at the date of the hearing the judge was entitled to come to the decision he did.

13. With regard to the ground relating to Section 117B of Part 5A of the 2002 Act, the representative submitted that the judge refers to this and finds that the terms of paragraph 276ADE of the Rules do not encompass the circumstances the Appellant finds herself in, so Article 8 outside the Rules has to be considered. He submitted that Section 117 deals with "the public interest question" relating to private life and Article 8. He submitted that all the considerations listed in Section 117B have to be applied and he pointed out that the Appellant speaks English well and this must be a positive factor and because the judge does not refer in particular to Section 117B(2) this omission is not a material error of law.

14. With regard to paragraph 117B(3) the judge finds that in light of the Appellant's mental illness, her moral and physical integrity must be considered and this outweighs public interest. He submitted that it was open for the judge to make this finding. With regard to Section 117B(4) and (5) it is clear that the judge had these in mind when he wrote paragraph 46 of the determination. The representative submitted that the judge has a statutory obligation to give weight to the Appellant's private life and he gives this weight and finds that it would be disproportionate to remove her from the United Kingdom because of the circumstances of her private life.

15. The representative then went on to compare Section 117B(4) and (5) to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which gives statutory guidance to judges and to the Home Office when credibility is assessed. I was referred to paragraph 21 of the written submissions and he submitted that it is clear that the judge has to have regard to Section 117A but this does not mean judges have to make certain findings. He submitted that the judge in this case was free to reach his own conclusions about the case. He submitted that the judge assessed what weight to attach to the Appellant's situation in the round and I was referred to paragraph 47 of the determination about how much weight constitutes "little weight" and the judge being able to make his own assessment of this. He submitted that that is the correct approach. He submitted that the judge has considered the period during which the Appellant's private life has been built up and has found that although she has been here unlawfully for part of the time, this was because of her mental state not just because she decided to remain illegally. He submitted that the judge has applied the appropriate weight to Sections 117A and B.

16. With regard to the third ground, that the judge misdirected himself when considering the impact of the cost of healthcare under the NHS for the Appellant if she continues to stay in the United Kingdom, he submitted that the judge has dealt with this properly and I was again referred to the said case of **Akhalu**. Based on that case the representative submitted that when the balancing exercise is carried out, it is necessary to consider the Appellant's medical situation. I was referred to paragraph 45 of **Akhalu** which states that the judge has to consider every aspect of the Appellant's private life as well as the consequences of her health, if removed but when dealing with proportionality the judge has to compare the levels of medical treatment available, although that will not have any real impact on the outcome of the exercise. This case states that it will be rare for a case to succeed where this is an important aspect of the Appellant's claim. The consequences of removal for the health of a Claimant who would not be able to access equivalent healthcare in their country of nationality, as was available in this country, is relevant to the question of proportionality but when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the Claimant's favour but speak cogently in support of the public interest in removal. The representative submitted that the judge has found that the Appellant's psychotic illness is a factor which has to be taken into account in the proportionality assessment and because of her illness he is satisfied that her unlawful status in the United Kingdom was not wholly deliberate. The judge finds that her unlawful status was not established voluntarily but as a result of the worsening of her mental state. Based on this he has made his decision relating to the cost of NHS treatment.

17. The representative referred me to paragraph 45 of the determination and the case law quoted therein, in particular the case of **AE Algeria [2014] EWCA Civ 653** in which it is stated

> "I do not consider that it would be inappropriate for the future cost and duration of the Appellant's daughter's treatment and care in this country to play a part in the balancing exercise as a matter relating to the economic wellbeing of this country, given the strains on the public finances."

The representative submitted that public interest is a significant factor. The judge has taken this into account in the balancing exercise but has still found for clear reasons, that on balance, even when taking into account the economic cost of further treatment, the Appellant's situation is that removal constitutes a disproportionate breach of her private life. The representative referred me to paragraphs 46 and 47, both of which refer to public interest and Section 117B. He submitted that the judge found that one of the reasons the Appellant stayed in the United Kingdom unlawfully was because she was mentally ill.

18. The Presenting Officer then submitted that he does not accept that the reading of Section 117B(4) and (5) of the 2002 Act can be considered in the same way as Section 8 of the 2004 Act which is about credibility. He submitted that the judge has to make his decision relating to Section 8 on the evidence available to him whereas Section 117 relates to public interest in which the Secretary of State's position is highly significant.

19. The Presenting Officer referred to the judge's reasoning about Article 8 and the case of **Akhalu**. He submitted that the only reason the judge has given for allowing the claim is the Appellant's medical treatment. He submitted that the case law makes it clear that public interest has to be considered and only very few rare cases based on private life, can succeed when the only matter in the Appellant's favour is her medical condition, when this is weighed against public interest. He submitted that there is nothing exceptional in this Appellant's medical condition which would result in the Appellant's private life succeeding over public interest. He submitted that the judge's Article 8 assessment based on the Appellant's health and her medical treatment cannot outweigh public interest. The judge has not identified anything to set this case aside as one of the few rare cases referred to in the country guidance case law.

20. The Appellant's representative submitted that Section 8 of the 2004 Act and paragraph 5A of the 2002 Act both deal with criteria which have to be taken into account when public interest is assessed and decision makers have to take both into account. He submitted that that is where the similarity lies. He also submitted that when this case is considered alongside **Akhalu** the judge I this case has taken into account the ill-treatment that mental health sufferers endure in Nigeria and the judge has looked at the Appellant's personal integrity and found this to be a rare case in his proportionality assessment.

21. The Presenting Officer submitted that the judge appears to have taken into account that the Appellant will suffer ill-treatment on return to Nigeria because of her mental health but the judge has made an error in his Article 3 findings and this has coloured

his findings relating to Article 8. He submitted that there is a clear error of law in the judge's determination.

Determination

22. With regard to the first ground of application and the Article 3 aspect of the claim, I have carefully considered the judge's findings relating to the Appellant's medical situation on return to Nigeria. The judge has considered the said cases of **N** and **D** and has accepted that it is only in very exceptional cases that an Appellant's claim can succeed under Article 3 if there is medical treatment for her condition in the country she comes from, even if it is not as good as the medical treatment she will receive in the United Kingdom. The judge accepts that there could be very exceptional cases where the humanitarian considerations are compelling and he then finds that the Appellant would have difficultly receiving treatment for her condition in Nigeria. The judge accepts that the Appellant does not cross the very stringent threshold for an Article 3 claim based on medical grounds only. The judge does not appear to have taken into account the fact that the medication which the Appellant is receiving in the United Kingdom and which is keeping her illness at bay, is available in Nigeria. The Appellant has family in Nigeria who will support her. It is not clear why the judge finds that the Appellant would have considerable difficulty in receiving treatment for her condition in Nigeria. In any case that is not what has to be considered. What is relevant is that her medication is available in Nigeria so she can return and this medication can keep her illness at bay.

23. The judge goes on to deal with the attitude to mental illness in Nigeria. He quotes two pieces of objective evidence. The first one is dated in 2013 and relates to one specific case and the second one is dated in 2003 and is out of date. The judge gives no particular reason for finding that this Appellant will be treated for her mental illness in Nigeria by traditional medicine and faith healers. The objective evidence before him shows that this type of treatment is available in Nigeria but so is official medical treatment. There must be an error in his decision when he finds that the Article 3 claim goes further than a claim based on medical grounds alone. There is no proper reasoning for this finding. Based on the country guidance case law and the objective evidence there would be no breach under Article 3 of ECHR if the appellant is removed from the UK. The fact that there is traditional medicine in Nigeria does not mean the appellant will be treated with it. This finding is based on conjecture for which there is no basis. The appellant is doing well on her medication in the UK so why would she not continue to take that medication in Nigeria? This appellant's claim is based on her medical condition and cannot succeed on this basis under Article 3.

24. With regard to Article 8 the relevant cases are quoted in the determination and the judge accepts that the criteria set out in Appendix FM and paragraph 276ADE of the Immigration Rules cannot be satisfied. The judge however finds that there is a good arguable case to consider this claim under Article 8 of ECHR outside the Rules. She explains this at paragraph 38. Her Article 8 findings are however coloured by her findings under Article 3.

25. The judge accepts that the Appellant has established a private life in the United Kingdom. She refers to the case of **Patel and Others [2013] UKSC 72** which states that Article 8 has limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity. The judge has taken into account Section 117B of the 2002 Act which states that little weight should be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully. This applies to this Appellant. Her private life was established when her immigration status was precarious. She has never had any status in the United Kingdom. The judge goes on to consider the definition of "little weight." What the judge does not appear to have understood is that Section 117B of the 2002 Act is a statutory provision. The judge cannot bend this to suit his needs. The Appellant came to the United Kingdom in 2005 illegally and her claim to have been trafficked and her asylum claim have both been rejected. The Appellant claimed asylum in 2014. She had been hospitalised in 2010 because of her mental health. For the judge to say that her unlawful status in the United Kingdom was not wholly deliberate is untenable. She deliberately came to the United Kingdom and stayed here with no status for at least five years before her illness took over. This is not an Appellant who came to the United Kingdom with status and then because of her health had to stay. This is an Appellant whose private life in the United Kingdom has always been unlawful and whose status has always been precarious. The judge states that her conduct has been largely determined by external factors but it is clear from her history that her conduct when she first arrived here was determined by her.

26. What the judge should have looked at is the Appellant's situation at the date of the First-tier hearing. The judge has not explained how he finds the possible cost to the NHS of dealing with the Appellant's illness is outweighed by the Appellant's right to respect for her private life and the need to protect her moral and physical integrity. The Appellant's representative submitted that it would not be correct to say that the Appellant does not have a firm diagnosis of her mental illness by a consultant psychiatrist as it has been found that she has a psychotic illness but the medical report makes it clear that there is no firm diagnosis of her mental illness and it is clear that she can receive the same medication as she is receiving in the United Kingdom. This is keeping her health problems at bay. The judge has misinterpreted the medical report and the considerable weight which has to be given to Section 117B of the Nationality, Immigration and Asylum Act 2002. He has gone against the statutory requirement to attach "little weight" to the Appellant's private life in her circumstances. The judge has failed to apply the case of **Akhalu** and has not recognised that the countervailing public interest in removal of the appellant must outweigh the consequences for the health of the Claimant as this Appellant can access healthcare facilities which will be satisfactory for her condition in Nigeria. The judge has failed to consider public interest correctly when assessing proportionality (Section 117A(2) of the 2002 Act). The judge has not taken into account the Appellant's ability to speak English and has not considered financial independence when dealing with the balancing exercise so the judge's decision may be flawed in this respect but his finding on Article 3, in which there is a material

error of law, has coloured his findings relating to Article 8 causing material errors of law in his Article 8 findings.

27. There are material errors of law in the judge's determination.

Précis of the Appeal and decision.

This is an Appellant who has been in the United Kingdom unlawfully since 2005. Her asylum claim has failed. She has a mental illness which is controlled by medication which medication is available in Nigeria where she comes from. For the same reasons as her asylum claim fails her claim under Articles 2 and 3 of ECHR and on the humanitarian protection issue must fail. She has not been trafficked and Article 3 is not engaged based on the evidence before the First-tier Judge. There is much speculation in the judge's reasoning relating to Article 3 and he has made a material error of law relating to this. The Article 3 threshold has not been reached within the claim. His assessment is flawed. Her claim under the Immigration Rules does not succeed under paragraph 276ADE or Appendix FM of the Immigration Rules. When public interest is taken into account her private life claim (she has no family life claim) cannot succeed as her time in the United Kingdom has been with no status and when the statutory provisions are taken into account it must be in the public interest for her to return to Nigeria. The First-tier Judge's findings under Article 3 which contain a material error of law have coloured his findings under Article 8. Her claim cannot succeed under Articles 3 or 8.

As there are material errors of law in the judge's determination I set aside the First-tier Tribunal's decision.

I dismiss the Appellant's asylum appeal, her appeal on the humanitarian protection issue, her claim under the Immigration Rules and her claim under ECHR.

No anonymity direction has been made

Signed Date

Deputy Upper Tribunal Judge Murray