**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/05862/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 21 August 2017** | **On 23 August 2017** |

**Before**

**Upper Tribunal Judge Southern**

**Between**

**PIUS JAMES UDUEHI**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr J. Walsh, counsel instructed by Lupins, Solicitors
For the Respondent: Ms Z. Ahmad, Senior Home Office Presenting Officer

**DECISION**

1. The appellant, who is a citizen of Nigeria, has an established pattern of securing entry clearance as a visitor, his adult children being resident in this country. He last arrived in the United Kingdom in May 2014 and was admitted as a visitor for the purpose of attending a family wedding. Unfortunately, he then fell ill and, on 25 March 2015 he was granted leave to remain as a visitor for the purpose of receiving private medical treatment until 25 September 2015. Just before that leave expired, he applied for leave to remain on the basis of rights protected by article 8 of the

ECHR. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Macdonald who, by a determination promulgated on 7 April 2017, dismissed his appeal against refusal of that human rights claim.

2. Although there is, before the Upper Tribunal, one appeal, that being the appeal of Mr Uduehi, the judge treated the appeal before him as being that of both Mr Uduehi and his wife, Mrs Francisca Uduehi. Permission to appeal has been granted to Mr Uduehi only. This is wholly unsurprising since, on the papers before me, it appears that the application for permission to appeal was renewed to the Upper Tribunal on behalf of Mr Uduehi alone. Neither party raised any issue concerning this and submissions from both Mr Walsh on behalf of the appellant and Ms Ahmad on behalf of the respondent were focused upon the circumstances of Mr Uduehi alone. If such an application was made on behalf of Mrs Uduehi, I have not seen it. It may be that, in the event, nothing much turns upon this, but I mention it to explain why the judge expresses himself in the plural when speaking of the appellants.

3. The judge summarised the appellant's case as follows:

> "The basis of the appellants' claim under article 8 was that the first appellant was ill and required treatment within the United Kingdom which was not readily available in Nigeria. In particular, hospitals in Benin would not be able to perform complicated heart surgery.
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> It was further contended that the appellants were elderly, struggled to look after themselves and that they would struggle to care for each other in Nigeria without support. They would be vulnerable to robberies, kidnapping and fraud having been the victims of four armed robbers in the past and fraudsters who deprived the first appellant of his savings.
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> It was stated that whilst in the United Kingdom the appellants' children would pay for any private medical treatment that the first appellant required and would provide personal care to the appellants."

And that of the respondent:

> "It was considered that these matters did not amount to exceptional circumstances. The respondent referred to the country of origin report indicating that there were several cancer organisations in existence in Nigeria and that cancer treatment was available and that private health care was available in Nigeria.
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> The respondent further pointed out there was no reason why the appellant could not apply for further entry clearance to continue medical treatment on a private basis in the UK and or to visit his family in the UK. There were therefore no exceptional circumstances identified.
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> It was considered that the second appellant's claim stood or fell with the first appellant's claim and leave to remain to the second appellant was also refused."

4. The evidence before the judge was that the appellant suffered from a range of medical conditions. The consultant cardiologist, Professor Kooner, said in a medical report dated 21 September 2015 (presumably prepared to inform and assist the application for further leave made on 23 September 2016):

> "Specifically, he has advanced coronary artery disease and sclerosis that requires surgery. He has a large renal stone that is on the verge of causing obstruction, additionally he has on-going treatment with radiotherapy for prostate cancer.
>
> He has recently developed quite severe limiting back pain for which he is having imaging.
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> He will be progressing on for coronary artery bypass surgery and aortic valve replacement.
>
> …
>
> I suspect that he will require a further six months in the UK and his treatment will be carried out privately since he is not an NHS patient.
>
> I envisage the cost of treatment to be in the region of £25,000 to £30,000

5. Despite that, it was confirmed in evidence given by the appellant's daughter before the judge at the appeal hearing in March 2017 that the appellant had not received this treatment:

> "… she confirmed that her father had not received surgery for his renal stone and no attempts had been made to reduce the stone by means other than surgery. Further, he has not received surgery for a coronary bypass as referred to [in the report of Professor Kooner]. He has not had the aortic valve replacement. The treatment for the first appellant's prostate cancer as referred to in the letter [from the physician treating that condition] has not been carried out. Apart from receiving drug therapy from his general practitioner the only treatment the first appellant has received whilst in the United Kingdom has been a quarterly Depot injection of Zoladex for his prostate cancer."

6. The judge recorded an acceptance by counsel for the appellant that the application made by the appellant was one that could not succeed under the immigration rules and that the appeal could not succeed under articles 2 or 3 of the ECHR on grounds of ill-heath or the need for medical treatment. The case for the appellant was advanced on the basis that the appeal should succeed under article 8 outside the rules.

7. In setting out his findings, the judge addressed first the asserted need of the appellant to remain in the United Kingdom to access medical treatment. The judge said that he was not persuaded that the appellant needed to remain for medical treatment. It was as long ago as 2 March 2015 that Professor Kooner said that the appellant required urgent aortic valve replacement, bypass surgery, removal of a renal stone and radiotherapy for prostate cancer, but none of that treatment had been carried out apart from hormone treatment for his prostate. The judge noted

that the appellant had been admitted "as an emergency" to a hospital on 11 February 2017 but that he was discharged promptly without having received any significant treatment. The judge observed:

> "Despite the letters suggesting quite extensive, invasive and serious treatment none of this has so far been carried out. There is little indication that it is going to be since no date has been arranged.
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> The sum total of the first appellant's treatment since he has been in the United Kingdom is a quarterly Depot injection of Zoladex and the prescription of drug therapy as listed by his general practitioner.
>
> …
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> I am not persuaded that the state of Nigeria private healthcare is such that the appellant cannot obtain the treatment that he currently received in Nigeria ….. there has been no suggestion by the first appellant's doctors that the drugs that the first appellant currently receives are not available in Nigeria."

8. Next, the judge considered the concern that had been expressed that, on return to Nigeria, the appellant and his wife, because of their vulnerability, would struggle to care for themselves. However, it had been established that they own a house in Nigeria and in the past had employed a security guard. There was no reason why, if one were needed, they could not employ a housekeeper. If it were necessary to do so, one of the appellant's children could travel to Nigeria to vet the appointment of such a person. In reaching that conclusion, the judge had regard to the views expressed by an independent social worker who had been commissioned to prepare a report but did not agree that it would be "cruel" for the Tribunal to reach a decision on the appeal that would have the effect of separating the appellant and his wife from their adult children.

9. The judge observed that the family life enjoyed between the appellant and his wife and their adult children had been developed while their immigration status was precarious and that limited weight should be given to private life established when a person is present with precarious immigration status. He said:

> "I also bear in mind that the Supreme Court has cited with approval the ECJ decision in Jeunesse which also emphasises that family life developed when immigration status is precarious attaches reduced weight."

The judge found also that the appellant and his wife were not financially independent and he doubted whether it was open to him, as he was invited to do by counsel for the appeal, to allow the appeal on the basis that there must be no recourse to public funds."

10. Drawing all of this together, the judge concluded that:

> "I am not persuaded that the first appellant's need for medical treatment for his various illnesses is as acute as has been made out. The first appellant has not taken

> the opportunity to have any of the surgical procedures identified by his private physicians carried out.
>
> … I accept also that the appellants are elderly and to an extent vulnerable and that they will be more vulnerable in Nigeria than they would be in the United Kingdom. However, this vulnerability can be mitigated by the employment of a housekeeper or carer in Nigeria.
>
> … I am not satisfied that the appellants are financially independent…
>
> Whilst I accept the appellants have a family life with their children in the UK, for the reasons set out above I attach little weight to it in the balancing exercise…
>
> As for medical treatment in Nigeria, there are private hospitals in Nigeria, the treatment so far received… can be continued in Nigeria. I am not persuaded that the more extensive and very expensive treatment referred to… will be carried out in the future. If it is carried out I am not persuaded that it will be paid for on a private basis if leave to remain were granted…
>
> I am not persuaded that the decision is disproportionate set against the public interest in maintaining immigration control and ensuring the economic well-being of the country."

11. Permission to appeal was sought on four grounds :

    i. As there was evidence from medical professionals that the medical treatment described above still needed to be carried out, it was not rationally open to the judge to find otherwise. Similarly, as paid invoices for medical treatment were provided, it was not reasonably open to the judge to find that any future treatment would not be paid for.

    ii. The second ground, founded upon *Paposhvili*, was not pursued by Mr Walsh and I need say no more about that other than that he was correct not to do so as it takes the appellant's case nowhere at all.

    iii. The judge was wrong to consider that leave could not be granted on the basis that there be no resort to public funds.

    iv. The judge fell into legal error if finding that little weight be given to family life developed while the appellant was present with a precarious immigration status.

12. I shall address the submissions advanced by Mr Walsh in respect of the first, third and fourth grounds in turn.

13. Mr Walsh pointed out that there was recent evidence before the judge explaining why treatment had been delayed. That was a letter dated 14 March 2017 from Dr Manger, who was responsible for treating the appellant's prostate cancer. He said that the appellant had not been given radiotherapy because he did not feel well enough to receive it because of his heart condition. But, although invited to do so,

Mr Walsh was unable to identify anything to explain why the surgical intervention to address the heart condition, said in 2015 to be urgent, had not yet been carried out. Mr Walsh pointed also to the documentary evidence before the judge that a significant number of invoices for private medical treatment had been paid and that one of the appellant's children had in excess of £20,000 in a bank account. But I was not referred to anything in the evidence to show that these funds had been earmarked for the medical treatment said to be required, as and when it was delivered, and, in any event, it was plainly open to the judge to find as a fact that the medical treatment for which the appellant had sought leave was not required urgently and that the treatment he in fact was receiving could be provided in Nigeria. Although some recent evidence was provided that the more invasive treatment described above was still required, the delay in providing it went largely unexplained and this provided a wholly rational basis for the conclusion reached by the judge.

14. For these reasons, the first ground fails to identify any error of law by the judge.

15. The third ground, that the judge was wrong to consider that it was not open to him to allow the appeal on the basis that leave should be granted subject to a condition that there be no access to public funds, falls away with the failure to establish the first ground. The judgment cannot be read in any way to indicate that but for this the judge would have allowed the appeal. Therefore, even if, which is not established, it had been open to the judge to allow an appeal on this basis, any such error is not conceivably material to the outcome of the appeal.

16. The final ground concerns the approach taken to the assessment of family life in the striking of a balance between the competing interest in play for the purposes of article 8 of the ECHR. It is clear that the judge considered that the weight to be given to the family life between the appellant and his wife with their adult children in the United Kingdom was reduced because that had been developed while they were present with temporary leave with no expectation of settlement. Two points are made in the grounds, specifically adopted by Mr Walsh in his oral submissions. First, section 117B(4) and (5) provide that little weight be given to private life or to a relationship with a qualifying partner established while unlawfully present of whilst present with precarious immigration status but this does not apply to family life with adult children that was not created during the time of precarious leave. Family life with the appellant's children was not created in the United Kingdom. Secondly, it is said that the "special and compelling nature" of the family life in this case is such that it should "override" the presumption of s117B(5).

17. Neither of those grounds is remotely arguable. The judge was plainly correct to have regard to the fact that the appellant was admitted as a visitor and then secured further leave for the purpose of having medical treatment which, largely, he did not in fact receive. The temporary nature of that leave was clearly relevant. Further, the evidence before the judge of the nature of the assistance rendered to the appellant by his children was not such as to establish anything approaching the asserted exceptionality. In her witness statement, Ms Aina Uduehi, the appellant's daughter,

describes herself as her father's "main carer". Her description of her assistance with her father's daily routine, set out at paragraph 17 of her statement at B26 of the bundle, discloses nothing that would be beyond what would be expected of a person such as the judge envisaged could be employed in Nigeria. As for precariousness, Ms Ahmad referred to the reported decision *Rajendran* (s117B-family life) [2016] UKUT 00138 (IAT), the headnote to which summarises the guidance given:

> *1. That "precariousness" is a criterion of relevance to family life as well as private life cases is an established part of Article 8 jurisprudence: see e.g. R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Jeunesse v Netherlands, app.no.12738/10 (GC).*
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> *2. The "little weight" provisions of s.117B(4)(a) and (5) of the Nationality, Immigration and Asylum Act 2002 are confined to " private life" established by a person at a time when their immigration status is unlawful or precarious. However, this does not mean that when answering the "public interest question" posed by s117A(2)-(3) a court or tribunal should disregard "precarious family life" criteria set out in established Article 8 jurisprudence. Given that ss.117A-D considerations are not exhaustive, in certain cases it may be an error of law for a court or tribunal to disregard relevant public interest considerations.*

18. As is generally the case with appeals against refusal to grant leave to remain on the basis of rights protected by article 8 of the ECHR, this was essentially a fact-based assessment and the judge, having heard oral evidence and received submissions was best placed to carry out that task. It is impossible to conclude that any material finding of fact made by the judge was one that was not reasonably or rationally open to him. When examined, the grounds amount to no more than an expression of disagreement with conclusions that were clearly open to the judge in respect of which he has given legally sufficient reasons.

Summary of decision:

19. First-tier Tribunal Judge Macdonald made no error of law, material or otherwise, and his decision to dismiss the appeal is to stand

20. The appeal to the Upper Tribunal is dismissed.

Signed

Upper Tribunal Judge Southern
Date: 22 August 2017