Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/18476/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 May 2017	**On 9 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

S A M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None
For the Respondent: Mr Staunton, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 6 December 1980. He appealed against the decision of the respondent on 28 April 2015 to refuse his application for leave to remain on medical grounds and to remove him from the United Kingdom. His appeal was dismissed by Judge of the First-tier Tribunal Chamberlain (the "FTTJ") in a decision promulgated on 22 September 2016.

2. Given my references to the appellant's medical condition he is entitled to anonymity in these proceedings and I make a direction accordingly.

3. Permission to appeal was refused in the First-tier Tribunal on the grounds there was no material error of law. However, it was granted by Upper Tribunal Judge Reeds on 10 March 2017 in the following terms:

> "The Appellant is not legally represented and it is clear from reading the determination of the First-tier Tribunal that he had given time to the Appellant to submit further

> evidence and written submissions by 19th August 2016. Whilst the judge had noted that he had not received any such evidence and proceeded to decide the appeal, there is evidence to suggest that further documentary evidence had indeed been submitted by the due date. Thus it is arguable therefore that due to procedural unfairness the documents relevant to the Appellant's case have not been taken into account by the judge and that the Appellant is entitled to consideration of his claim. Therefore permissions is granted."

4. Thus the appeal came before me.

5. In his grounds of appeal to this tribunal the appellant made various points which I summarise as follows. The appellant had not received the respondent's bundle prior to the hearing before the FTTJ; he did not therefore have the opportunity to "study and prepare for my responses and arguments based on the same". He attributed the respondent's failure to provide the bundle to a deliberate attempt to weaken the appellant's position at the hearing, in the knowledge the appellant did not have legal representation. He confirmed he had produced "further written submissions" as permitted by the FTTJ and that these had been received by the tribunal by the due date. He provided an update on his physical condition (including material post-dating his letter to the Tribunal of 17 August 2016). He stated that he had been under no obligation to pay for NHS treatment because the NHS surcharge had come into effect after his application and the appeal. "Moreover, there is no mechanism within the NHS to receive a voluntary NHS surcharge payment, unless it is paid along with the immigration application. This was verbally confirmed to [the appellant] at [his] hospital". He averred that the FTTJ had made her decision "without considering the above evidences and without taking into account [his] deteriorating health condition". He requested permission to appeal to the Upper Tribunal "so that [he could] continue with the treatment and monitoring of [his] Chronic Kidney Disease and subsequent reoccurring gout attacks, in order to make sure [he does] not face an early death like situation in India which is likely to leave my partner, children and old age parents orphaned and unsupported financially, emotionally and physically. .." He went on to state:

> "Hence I request that this critical matter be heard by the Upper Tribunal in the light of all the attached evidence, so that the interests of justice are honestly taken care of, since the current decision breaches my human rights and also breaches Article 8 of ECHR."

The appellant then refers to the guidance in **D v United Kingdom [1997] 24 EHRR 423, R (Adam, Limbuela and Tesema) v Home Secretary [2005] UKHL 66** and **N v UK, 27 May 2008.**

6. In his oral submissions to me, the appellant reiterated these points and gave a further update on his medical condition and prognosis. He submitted that the FTTJ would have made a different decision had she considered the documents he had provided after the hearing.

7. For the respondent, Mr Staunton accepted that the tribunal had received on 19 August 2016, the due date set by the FTTJ, the appellant's letter of 17 August 2016. He noted that paragraph 4 of the FTTJ's decision indicated an invitation to the appellant to provide written submissions to counter the submissions of the presenting officer and the refusal letter. Instead the appellant had provided documentary evidence relating to his medical condition. This had already been considered at paragraphs 21-29 of the decision. He submitted that the additional evidence was immaterial to the outcome of the appeal which could not succeed given the high threshold outlined in **N v Secretary of State for the Home Department [2005] UKHL 31**. Thus there was no material error of law.

Analysis – Error of Law

8. The following is the FTTJ's record of events at the hearing, as set out in her decision:

> "3. The Appellant was not legally represented. He confirmed at the hearing that he understood the reasons that his application had been refused. He said that he had been through the immigration rules. I explained the hearing procedure to him. He then said that he had not received the Respondent's bundle, although he had repeatedly asked for it. There was no evidence to substantiate this claim. The decision had been made on 28 April 2015, some 12 months prior to the hearing. I gave him the opportunity to consider the contents of the Respondent's bundle, which consists of the evidence which the Appellant himself provide with his application, together with the Country of Origin Information which is referred to in the reasons for refusal letter.
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> 4. I then heard oral evidence from the Appellant. At the conclusion of his evidence, the Appellant said he wanted the opportunity to provide further written submissions. I pointed out to him that he had had ample opportunity to instruct legal representatives since the application was refused in April 2015. He said that he did not want to appoint representatives, but wanted to consult with some friends who were lawyers. He gave no satisfactory reason for why he had not been able to consult with these friends prior to the hearing. However, given he was not represented I considered that it was in the interests of justice to give him the opportunity to provide further written submissions. Mr. Vaghela confirmed that he was content with this. I gave the Appellant until 19 August 2016 to provide any further written submissions. As I had not received anything by the end of August, I checked with the Tribunal Service. On 7 September 2016 it was confirmed to me that no further submissions had been received from the Appellant.
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> 5. In the circumstances I proceed to make the decision on the basis of the evidence before me and the submissions made by the Appellant at the hearing in response to Mr. Vaghela's submissions.
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> 6. The evidence before me consisted of the Respondent's bundle (to Annex O2), further documents provided by the Appellant with the grounds of appeal, consisting of a letter from an Infants School, a letter from a Primary School and two birth certificates …., together with two letters from the Department of Nephrology and General Medicine at Guys and St Thomas's Hospital, dated 27 October 2015 and 25 February 2016, which the appellant provided at the hearing. The Appellant did not provide a witness statement."

9. It is not in dispute between the parties that the appellant wrote to the Tribunal on 17 August 2016, after the hearing, enclosing various documents, and that his letter was received by the Tribunal on 19 August 2016.

10. However, the first point to note is that the FTTJ had given the appellant time to make "further written submissions" after the hearing. She did so because the appellant had told her he had "wanted to consult with some friends who were lawyers". The appellant's letter to the Tribunal dated 17 August 2016 refers to his having been "allowed the opportunity to submit my supporting evidences before 19th of August 2016, by the Honourable judge, during the hearing session". This statement is not correct: both in her record of proceedings and in her decision the FTTJ refers to allowing the appellant to produce "written submissions" by 19 August. There is no reference either in her record of proceedings or her decision to the appellant's being permitted to adduce additional evidence. The direction to serve written

submissions is consistent with appellant's wish to consult friends who were lawyers. It is most unlikely the FTTJ would have made a direction for further evidence to be adduced because this would have disadvantaged the respondent who would not have the opportunity to examine that evidence or make submissions on it, before the FTTJ made her decision. It is also unlikely the Home Office Presenting Officer would have agreed to such a step.

11. The appellant referred at the hearing in the FTT, in his letter of 17 August 2016 and in his submissions to me to the fact that he had not received the respondent's bundle before the hearing. However, the FTTJ's decision records that she gave the appellant access to that bundle and time to consider it. She noted that it contained all the documents which had been sent by the appellant with his application for leave to remain. Thus I am unable to find that the appellant was disadvantaged by not seeing that bundle prior to the hearing. Furthermore, the FTTJ's decision demonstrates she took its contents, and therefore the appellant's documents, into account in her decision-making. Her decision to allow the appellant time to make further written submissions was sufficient to enable the appellant to address the late disclosure of the respondent's bundle, particularly given that he had already submitted evidence in support of his appeal with his notice of appeal.

12. While I accept that, in principle, a failure to take into account material which had been produced by the due date would amount to procedural unfairness I am unable to find there has been procedural unfairness in this case for the following reasons.

13. First, the letter and enclosures produced by the appellant are not written submissions. The appellant's letter of 17 August 2016 is an attempt to adduce additional evidence most of which, he told me at the hearing, had not previously been seen by the respondent. Given that the direction of the FTTJ was for further written submissions to have been provided, it would have been procedurally unfair for the FTTJ to have taken into account fresh evidence which the respondent had not previously seen and on which the respondent had not had the opportunity to make submissions.

14. Secondly, this was an appeal on Article 3 grounds only. The appellant's condition and prognosis were well documented by the appellant in his application to the respondent and in the documents he submitted with his notice of appeal.

15. The FTTJ, at [18], states she did not find the appellant "entirely credible". She found his "conduct in relation to his appeal damages his credibility and I find that it was his conscious choice to attend the hearing without having instructed representatives, and without having prepared at all. He is a well educated man with friends who are lawyers who could have assisted him, but he decided instead to attend the hearing without having done any preparation.". This finding is not challenged by the appellant. While I appreciate he was not legally represented at the hearing before me, an educated man such as the appellant might be expected to challenge a finding that he was not "entirely credible". The FTTJ's findings in this regard are sustainable.

16. The FTTJ also finds that doubt is cast on the appellant's claim that he is willing to pay for medical treatment because he had provided no evidence of any attempt to pay the NHS surcharge or for medical treatment to date. The appellant challenges this finding on the ground that the requirement to pay the NHS surcharge with an immigration application came into effect from April 2015 whereas the appellant made his application in October 2014. However, irrespective of this erroneous finding, it is the case that there was no evidence before the FTTJ that the appellant had paid for NHS treatment to date. To that extent the FTTJ was justified in raising concerns about his willingness to pay for future medical treatment.

17. The FTTJ made the following finding at [19]

> "I also find that it casts doubt on his credibility that he has failed to provide any further submissions, despite asking for the opportunity to do so, and despite having been given over three weeks in order to do so."

This is an inappropriate finding given the appellant had, by then, written to the Tribunal. However this error had no material impact on the outcome of the appeal. Irrespective of the adverse findings on credibility (whether or not sustainable on the evidence), this appeal was bound to fail. The sole ground for the appeal was Article 3. The appellant's condition and prognosis was well documented, including by the appellant himself. Background material was provided by both the appellant and respondent with regard to the availability of treatment in India. The FTTJ principally made her findings as regards these matters on the basis of the medical evidence and background material before her, not on the basis of the appellant's credibility as a witness.

18. There was no dispute between the parties that the appellant suffered from chronic kidney disease and gout. However, the appellant's condition was not so debilitating as to prevent him from being in employment at the date of the hearing before the FTTJ.

19. The FTTJ cited the evidence of a consultant nephrologist who, following an examination in February 2016, did not need to see the appellant for the following six months. The FTTJ inferred, not unreasonably, that the appellant's "medical conditions are not at a critical stage". She noted the "Appellant was not receiving dialysis and there is no indication in this letter that he will need to receive dialysis in the near future". The FTTJ noted the only medication he was taking in February 2016 was available in India and that the appellant did not aver otherwise. Her finding that he would be able to obtain his current medication in India is sustainable on the evidence.

20. The FTTJ took into account the opinion in 2015 of a consultant nephrologist as regards the availability of treatment in India but noted it was not consistent with the background material provided by the respondent; nor had that consultant given any explanation for his opinion. The FTTJ was entitled to prefer the material provided by the respondent as regards the availability of dialysis in India should that be required in the future.

21. The FTTJ also noted that the appellant was currently working at the date of hearing. He had been working for two years in his current role and had worked prior to that. She noted rightly that the threshold "required to show that the decision breaches the Respondent's obligations under Article 3 is very high".

22. In **N** the House of Lords said that the test in this sort of case was whether the claimant's medical condition had reached such a critical stage (ie the claimant was dying) that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he was dying. The fact that he would be deprived of medical treatment which would otherwise prolong his life is not the main consideration. Lord Brown pointed out that the additional factor which set **D v UK** [**1997] 24 ECHR** in contrast to more recent cases was that D had no prospect of medical and family support on return. On appeal to the ECtHR in **N v UK Application ECHR 26565/05** the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non-State body. The legal test was set out at paragraph 42 as follows

> "A decision to remove an alien who is suffering from a serious physical or mental illness to a country where the facilities for treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3 but only in a very exceptional case where the humanitarian grounds against the removal are compelling. In the **D** case the very exceptional circumstances were that that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food shelter or social support".

The ECtHR said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin. The fact that the person's circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. Those same principles had to apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost.

23. In **GS (India) & Ors v SSHD [2015] EWCA Civ 40** it was held that the case of a person whose life would be drastically shortened by the progress of natural disease if he was removed to his home State did not fall within the paradigm of Article 3. Such a case could only succeed under that Article if it fell within the exception articulated in **D**.

24. Since the FTTJ's decision, the judgment in **Paposhvili v Belgium (Application No. 41738/10, 13.12.16)** has been issued. While that softened the approach in **N v UK**, it does not assist this appellant whose medical condition is not even such as to prevent him from undertaking employment. Even on the appellant's own evidence, his condition does not approach the level of severity required to engage Article 3. The FTTJ found, on sustainable grounds (the background material produced by the respondent), that appropriate similar treatment was available to the appellant in India. Even when seen in the context of the latest guidance in **Paposhvili**, the FTTJ's findings in the light of **N v UK** are sustainable and coherent. On the evidence available to the FTTJ, the act of removal of the appellant will not expose him to an Article 3 risk.

25. There is no challenge by the appellant to the FTTJ's findings under Article 8 insofar as his family life is concerned.

26. To conclude, in summary, I am satisfied that

    (i) The appellant did not produce further written submissions by 19 August 2016, as directed by the FTTJ.

    (ii) The failure of the FTTJ to take into account the additional evidence in the appellant's letter of 17 August 2016 did not amount to procedural unfairness.

    (iii) Even if there had been procedural unfairness such as to amount to an error of law, such an error could not be material because the appeal was bound to fail, given the evidence of the appellant's condition and prognosis and the availability of treatment in India.

Decision

27. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

28. I do not set aside the decision.

Signed ***A M Black*** Date 8 May 2017
Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14, 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 their 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 ***A M Black*** Date 8 May 2017
Deputy Upper Tribunal Judge A M Black