Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32927/2013

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal on 18 August 2017	**Decision and Reasons Promulgated on 29 September 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SM
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Pipe instructed by TRP Solicitors
For the Respondent: Mr S Kotas Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge M A Hall promulgated on the 22 November 2016 in which the Judge dismissed the appeal.

2. The appellant is a citizen of Kenya born on the 6 May 1948. Having considered the evidence with the required degree of anxious scrutiny the Judge sets out his

findings from [26] of the decision under challenge which may be summarised as follows:

a. The appellant entered the United Kingdom as a visitor in August 2012 with leave valid to 14 February 2013. The application for leave to remain based on family and private life was made before the expiry of that leave [27].
b. The appellant visited the UK previously. He and the sponsor married in the UK on 3 May 1980. The sponsor left the appellant and her children in Kenya in 1995 to live in the United Kingdom. She was granted indefinite leave to remain in December 2004 [28].
c. The appellant has visited the United Kingdom on a number of occasions but lived apart voluntarily between 1995 and 2012 with the sponsor visiting Kenya to see her family once a year [29].
d. The appellant and sponsor have two adult children one living in the United Kingdom and the other in Kenya. Their son in Kenya is self-employed, single and 29 years of age. The appellant's granddaughter in the United Kingdom is 8 years of age [30].
e. The appellant was diagnosed with HIV in 2005 and Type II diabetes and had multiple strokes before entering the United Kingdom which left him with impaired gait and speech according to a NHS letter dated 10 May 2013 [31].
f. In January 2013, the appellant was admitted to hospital on an emergency basis and subsequently diagnosed with end stage kidney disease and also dementia and hypertension [32].
g. The appellant has lived with the sponsor since August 2012 although spent substantial periods of time in hospital. The appellant's adult daughter and granddaughter do not live with the sponsor [33].
h. The Judge was satisfied the appellant has family life with the sponsor as husband wife, that the appellant has not established family life that would engage article 8 with his adult daughter as there was no evidence of dependency above normal emotional ties, but it was accepted the appellant had established family life that would engage article 8 with his granddaughter [37].
i. The Judge finds the decision is in accordance with the law and that the issue in the appeal related to proportionality [39 – 41].
j. The Judge found he must take into account the very significant cost to the National Health Service of treating the appellant. The sponsor gave evidence that the appellant had received a bill from the NHS of approximately £13,000 in 2013 for the early stages of treatment. The sponsor confirmed initially that £100 was paid towards the bill which was passed to a debt collection agency in relation to which the sponsor has agreed to pay £10 per month but is unsure how much has been paid. The Judge found the appellant's treatment, which includes dialysis three times a week, will have far exceeded the sum of £13,000. The cost of treatment is far higher in the United Kingdom than in Kenya. It was not

found realistic the appellant will be able to reimburse the NHS for the cost of the treatment received in the United Kingdom [45].

k. The appellant had adequate medical treatment before entering the United Kingdom although it did not include medical conditions diagnosed since his arrival. The sponsor confirmed the appellant was able to have treatment in a private hospital and that he had a health scheme which meant he did not have to pay all the costs. The appellant was able to pay for home help. The family home in Kenya is currently rented to tenants and the income from that assists with payment of legal fees [46].
l. Medical treatment for the sponsor's medical condition is available in Kenya in relation to which the Judge refers to comparative cost [47].
m. The appellant's family will be able to offer some financial assistance with medical care. The sponsor is able to make some payments towards his healthcare and currently has a reduced income as she is not working full-time because she is caring for the appellant [48].
n. Family life established between the sponsor and appellant was not established when the appellant was in the United Kingdom with precarious status and has not been in the United Kingdom unlawfully [49].
o. The Judge attaches significant weight to the fact the appellant cannot meet the requirements of the Immigration Rules [50].
p. The Judge concluded he must place significant weight on the fact there is a very significant cost to the NHS in providing the appellant with the medical care that he requires in this country [51].
q. The weight to be attached the public interest exceeds the weight to be attached to the wishes of the appellant and his family that he remains in the United Kingdom. The Judge accepted a doctor's letter stating at the present time the appellant is not fit to fly but that the decision is that the appellant is not entitled to leave to remain as his removal would not breach article 8 and therefore when he is fit to fly his removal from the United Kingdom would be proportionate taking into account the public interest [52].

3. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal the operative part of the grant being in the following terms:

> "2. The grounds assert that the judge failed to conduct a proper balancing exercise but demonstrated a flawed approach to the issue of proportionality. Having found the family life exists between the Appellant and his Sponsor (and granddaughter) the judge placed no weight upon those relationships. The judge at [52] attached significant weight to the cost to the NHS of the appellant's treatment in the UK and found that weight exceeds the weight to be attached to the wishes of the Appellant and his family that he remains in the UK. There is no analysis whatsoever of the position of the appellant's wife. The family life that

> exists should have been considered from the viewpoint of all other family members. The judge's findings upon proportionality are unclear. The questions raised are fundamental to the appeal but are entirely unaddressed in the decision. The judge failed to place any actual weight upon the appellant's family life grounds and the position of the appellant's wife. The judge found that the appellant is not fit to fly [52] but that when he is fit to fly his removal would be proportionate. It is the task of the judge to decide the appellant's appeal upon the circumstances prevailing at the date of the hearing. At that time the appellant could not be removed as he was not fit to fly. The judge erred in law.
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> 3. In an otherwise careful and focused decision and reasons, it is nonetheless apparent that the judge found that the appellant at the date of the hearing was not fit to fly/be removed from the United Kingdom. The judge went on to find that when he is fit to fly, the appellant's removal from the United Kingdom would be proportionate taking into account the public interest. That is a difficult finding to maintain. It is at least arguable that the judge cannot properly decide what the future circumstances would be when the appellant was fit to fly. It is at least arguable that a fresh proportionality balancing exercise should be undertaken on what may be changed circumstances at that time. In all the circumstances it is at least arguable that the judge's findings are inconsistent and that the inconsistency amounts to a material error of law."

4. The Secretary of State opposes the appeal asserting in the Rule 24 response of 19 July 2017 that:

> "3. It is submitted that the appellant's grounds of appeal are misconceived. It is self-evident that the FTI J takes into account the family life of all members of the family at paragraph 36 when the FTI J invokes Beoku Betts, the FTI J then finds that family life exists between A and P and his granddaughter. At no point, as alleged in the grounds does the FTI J states that he gives no weight to that family life, in fact the FTI J notes @49 that FL was not contracted whilst A was in the UK unlawfully or precariously.
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> It is submitted that had the FTI J only taken into account matters pertaining to the date of hearing, as asserted in the grounds, then the appellant could not have succeeded in any event. If the appellant could not leave the UK because he was unfit to fly then there will be no interference with his family life."

Error of law

5. The Judge was tasked with considering the appellant's appeal at the date of the hearing. The appeal, on article 8 grounds, asserted that any interference with the protected right relied upon by the appellant and other family members was disproportionate to the legitimate aim pleaded by the Secretary of State, i.e. that any interference was not warranted.

6. The Judge was required to determine the position at the date of the hearing with a view to what may happen if the decision appealed against stands and removal from the United Kingdom occurs.

7. The assertion the Judge failed to take into account the position of other family members has no arguable merit as the Judge was clearly aware of the existence of a wife, daughter and granddaughter and make specific findings in relation to family life that exists between the appellant and these family members. The Judge, for example, finds that family life recognised by article 8 exists between the wife and the granddaughter but not the daughter. It is not suggested that the granddaughter will do anything other than stay with her own parents in the United Kingdom with no issue arising of the best interests of the granddaughter being adversely affected as a result of the impugned decision.

8. In relation to the appellant's wife, the Judge noted the fact she had reduced hours to care for the appellant and the support that she was giving the appellant in the United Kingdom, but also the support she would be able to give if he is returned. The Judge noted the oral and written evidence from this source and it is not made out that being aware of the appropriate legal test and the evidence made available, this experienced judge would have failed to factor the material into the proportionality assessment. Indeed, the Judge notes that there is a very significant public interest in maintaining effective immigration control and places substantial weight upon the fact the appellant cannot meet the requirements of the Immigration Rules and also significant weight on the fact there is a very significant cost to the NHS in providing the appellant with the medical care that he requires. At [52] the Judge clearly draws together the threads of the evidential and legal process making specific reference to the fact that the weight to be attached to the respondent's position exceeds the weight to be attached to the wishes of the appellant and his family. Whilst the Judge may not have set out chapter and verse on findings in relation to each and every aspect relied upon it is clear these matters were considered and it is not made out that the outcome of the proportionality exercise is infected by arguable legal error based upon the assertion the Judge failed to deal with the impact on the wife and the family. This information was clearly contained in the appellant's wife's witness statements and oral evidence noted by the Judge.

9. Mr Kotas also referred to the skeleton argument presented to the First-tier Tribunal dated 9 November 2016 and the fact the Judge analyse the article 8 assessment on the basis advanced by the appellant. It was submitted, for example, that in the two witness statements provided by the appellant's wife that of 27 June 2014 is brief with the emphasis being on the impact for the appellant and what the appellant's wife did for him, and the second statement referring to the fact that health was not the only issue but also the fact there are family in the United Kingdom including the daughter, but with the overwhelming emphasis of the evidence being on the impact on the appellant and the appellant's health of removal. It is arguable that the case presented to the Judge was an article 8 medical case in which the appellant's wife failed to adduce sufficient evidence to establish that her own situation was sufficient to tip the balancing exercise in the appellant's favour.

10. In relation to the issue of the Judges reference at [52] to a letter from a Dr Borrows, this is clearly a matter of which the Judge was fully aware. There is within the bundle filed for the purposes of the appeal before the First-tier Tribunal a number of letters relating to the appellant's medical situation. These include correspondence dated 6 March 2013, 10 May 2013, 17 June 2013, 26 September 2016 and the additional correspondence referred to by the Judge at [22] dated 8 November 2016. The Judge noted what Dr Borrows said about the medication the appellant required and that he receives dialysis three days a week and indicating that the doctor would not be surprised if the appellant were to die within six months and that at the present time, and unless or until the overall position changes, the appellant is unfit to travel by air.

11. The grounds do not seek to rely upon articles 3 ECHR and presented the case by reference to Article 8 ECHR and the Immigration Rules. It is not made out the Judge made any arguable legal error material to the decision to dismiss the appeal by reference to the Rules.

12. On the basis of the Judges assessment of the balancing exercise, ignoring the letter from Dr Burrows for this moment, there appears to be no arguable legal error material to the decision made out on the basis the Judge was aware of the appellant's medical condition and concluded that adequate medical facilities are available for the appellant's treatment in Kenya. It was not made out that such treatment was not available, including dialysis, as there is a specific reference to this in [47] of the decision under challenge. The Judge also found the appellant's family will be able to offer some financial assistance with medical care.

13. The Judge also paid specific attention to the guidance provided by the Upper Tribunal in *Akhalu [2013] UKUT 00400*. The Judge clearly took into account that the countervailing public interest in removal will only be outweighed by the consequences for the health of the appellant because of any disparity of health care facilities in all but a very few rare cases and that the consequence of removal for the health of the appellant who would not be able to access equivalent healthcare in Kenya was clearly relevant to the question of proportionality, but that 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 appellant's favour but speak cogently in support of the public interests in removal in this case.

14. The evidence clearly supported the finding that at the date of hearing the respondents had discharged the burden of proof upon her to the required standard to show that the decision was proportionate.

15. An example another case involving kidney failure is that of *MT v Sweden (Application no. 1412/12) ECtHR (Fifth Section)* which was a case concerning the availability and access to adequate medical treatment for kidney failure to an

applicant who was to be expelled to Kyrgyzstan. Relying on Article 3, the applicant argued that adequate medical care was not available to him in Kyrgyzstan that he would die within a few weeks in the event of his forced return there. The ECtHR ruled that there was no violation of Article 3 in the event of his expulsion.

16. The question that arises in relation to the letter from the doctor is whether that suggests the Judge should have taken into account the situation that existed at the date of hearing, in a manner other than that which he did, that would have a material impact upon the decision. The statement by the Judge that when the appellant is fit to fly his removal from the United Kingdom will be proportionate is finding reasonably open to the Judge when that question is assessed on the basis of the information that existed at the date of the hearing. The Judge could have added a rider "subject to any later developments" but omitting the same does not arguably give rise to an error of law material to the decision to dismiss the appeal. One issue faced by the Judge is that it is not known how long the appellant would remain unfit to fly or whether if the appeal failed and removal became imminent appropriate arrangements could be made. The evidence before the Judge did also not indicate that the inability of the appellant to fly is a permanent state of affairs. The appellant is not on permanent dialysis and failed to adduce evidence to suggest that if he had dialysis or treatment in a planned manner on a particular day that he would not be able to fly to Kenya to liaise with the medical authorities to enable him to continue his treatment there immediately after arrival.

17. This case is not pleaded as a "death-bed" case pursuant to article 3 and the Judge found that adequate medical treatment existed in Kenya.

18. The other point to note is that the statement by Dr Burrows is conditional namely "at the present time" and "unless or until the overall position changes". What that evidence did not do show is there was any insurmountable obstacle or anything relating to the appellants medical condition that was sufficient to indicate that this factor makes out arguable legal error material to the decision to dismiss the appeal. The appellant will always have the right to make a further application if circumstances warrant which will have to be considered and either refused with a right of appeal or certified as not amounting to a fresh claim by the respondent which will then give rise to either an appeal or application by way of Judicial Review.

19. This is not a case involving an organ transplant and it cannot be said the Judges conclusions are outside the range of those reasonably available to him on the basis of the facts and relevant and applicable legal provisions. The understandable desire for a different outcome in the mind of the appellant and the family does not, per se, make out arguable legal error. Article 8 is not a mechanism which entitles a person to choose where they wish to live and the government of the United Kingdom, in accordance with applicable legal provisions and its margin of appreciation in such matters, has declined to allow

the appellant to remain in the UK with his resultant use of the facilities of the NHS.

20. Appeal dismissed.

Decision

21. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 28 September 2017