Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00631/2017

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 10 August 2017	**On 14 August 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MADI [K]

Respondent

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Mrs F Farrell, of P G Farrell, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this decision refers to them as they were in the FtT.

2. By a decision dated 5 January 2017 the SSHD refused the appellant's claims on all available grounds.

3. By a decision promulgated on 12 May 2017 First-tier Tribunal Judge P A Grant-Hutchison allowed the appellant's appeal "on human rights grounds under article 8 only".

4. The SSHD's grounds of appeal to the UT, in summary, are as follows:

> At ¶19 and 22, unclear against what threshold the judge considered proportionality.

At ¶24, implied test of reasonableness of being expected to return applied to the core issue of the medical condition of the oldest child of the appellant's partner (Benny) but neither he nor the other children living with the appellant were qualifying children under s.117B(6) of the 2002 Act, so that was not the test.

The test outside the rules was compelling circumstances, which must amount to more than "mere hardship, mere hurdles, mere upheaval and mere inconvenience, even where multiplied": *Treebhawon* [2017] UKUT 00013.

The countervailing public interest in removal outweighs consequences for the health of an appellant because of a disparity of health care facilities "in all but a very few rare cases"; "when weighed against the public interest in ensuring that the limited resources of the country's health services are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in [an appellant's] favour but speak cogently in support of the public interest in removal": *Akhalu* (health claim: ECHR article 8) [2013] UKUT 400.

The judge refers at ¶24 to a letter from Dr O'Regan, but not to submissions for the SSHD that there was no basis for the statement that treatment would not be available in the DRC.

The judge noted that the appellant's partner and children could return with him to their country of nationality, so it was not apparent why this would be one of the "very rare cases" envisaged above, or that receipt of DLA benefit would be sufficient to justify the decision. The proportionality reasoning was inadequate.

The judge's consideration of the appellant's relationship with a UK citizen child whom he had rarely seen was inadequate, given the challenges made by the SSHD to the genuineness of the relationship, and absence of a statement from the child's mother about contact. No reason was given for saying that communication would be exceptionally difficult, or why modern communications would be an inadequate substitute for infrequent contact.

5. The appellant filed a response, dated 6 July 2017, to the notice of appeal, which in summary is on these lines:

The judge correctly applied the *Razgar* test.

(The eldest child arrived in the UK not in January 2011 but in January 2012.) The judge did not apply a wrong test of reasonableness. He made it clear at ¶19 that he was to consider whether the circumstances were "relevant, weighty and not fully provided for within the rules. In practice, they are likely to be both compelling and exceptional, but this is not a legal requirement."

The appellant's partner and her three children [after various procedure] were all given discretionary leave. The SSHD had therefore accepted that the eldest child could not be successfully treated in the DRC. This submission was unchallenged by the presenting officer.

The judge was referring to the comments by the doctor rather than making a specific finding about treatment in the DRC.

The article 8 findings are sound and in accordance with the law.

Contact from overseas by modern communications is not a relevant consideration: *Hussini* [2017] CSOH 80.

Since the hearing the appellant's partner and children have had their [discretionary] leave extended until 13 December 2019. Permission is sought to admit evidence thereof.

6. Mrs Farrell indicated that the further evidence was tendered only if error of law was found and the decision required to be remade. Mr Matthews said that there would be no objection to its admission, and confirmed that the respondent had granted further leave.

7. The family situation is not entirely clear from the decisions of the respondent and the FtT. Mrs Farrell said that the appellant lives with his partner and three children. The oldest, Benny, is not his biological child. The two younger ones are the children of the appellant and his partner. The appellant, his partner and those three children are all citizens of the DRC, and of no other country. The appellant has another child, residing in England, who is a UK citizen. Mr Matthews did not dissent from that summary of the essential background facts.

8. Mr Matthews submitted thus. The case should have been decided according to principles well established for cases where family life is carried on by persons with only precarious status, now confirmed by *Agyarko*. Even at ¶19 the judge did not state the law quite correctly. More importantly, at ¶24 he effectively decided the case by the question whether it was reasonable to expect the appellant's partner to leave, by reference to the health of her child. That was a significantly lower standard than the correct one. It would be bizarre if the case could succeed outside the rules by criteria lower than those which would apply if the case came within the rules (that is, by reasonableness rather than insurmountable obstacles). This was not just poorly chosen or loose language, but failure to recognise the correct legal parameters. The high point of the appellant's case was Benny's heath condition. That was a "very difficult epilepsy" as disclosed by the report of the consultant neurologist, Dr O'Regan, but it fell short of the standard for a case to succeed only on health grounds. It was accepted that health care might not be available to the child in DRC to UK standards, but the SSHD had cited evidence that treatment for epilepsy was available at ¶107 – 121 of the refusal decision, to which the judge did not refer. The judge appeared to adopt uncritically Dr O'Regan's assertion that treatment was unlikely in the DRC, but she was an expert in neurology, not on medical standards in the DRC. She had no more standing in that respect than any other witness. The Judge took the receipt of Disability Living Allowance as an indication of the seriousness of the condition, which was an unjustified inference. Recipients of DLA even at its highest rates may carry on normal working lives. The child was not born in the UK but came here after his mother did, when aged 6. Her evidence was silent as to how his condition had been treated while he lived in DRC. The judge was not referred to *Akhalu*, but that was a statement of well-established law which he was bound to apply. This was a case where none of the family members living with the appellant had more than precarious status. The judge had taken the appellant's relationship with his UK citizen child as a factor, when there was no evidence of meaningful contact. The case was capable of decision either way, but the present decision could not survive excision of its errors. It should be remade, based on all the evidence and submissions, applying the considerations under art 5A of the 2002 Act, and the principles of precarious cases. The appellant made no claim to financial independence. He had given evidence through an interpreter, so ability to speak English was not in his favour either. The outcome should be reversed.

9. Mrs Farrell relied upon the reply above, and submitted further as follows. The judge at ¶19 articulated the correct test, which could be confirmed by reference for example to *Lama* [2017] UKUT 00016 at ¶29, a decision of the President: the test is "compelling circumstances". It was undisputed that family life existed for article 8 purposes. Although on very different facts, the legal exercise carried out by the FtT was along the lines exemplified by *Lama*. It was disingenuous for the SSHD to argue that Benny should reasonably leave the UK, when the SSHD had conceded and paid expenses of a judicial review brought on the basis of his condition, and had then granted leave to the other family members.

10. Mr Matthews said in reply that the reasons for conceding the judicial review and the grants of leave had not been before the FtT, would have turned on different considerations to the present case, and were not to be taken to show that the SSHD was disingenuous. The grant of discretionary leave to remain could not be assumed to depend solely on the child's condition. There were complex policies on enforcement of removal. The removal of the appellant would be proportionate notwithstanding the leave granted to family members, whose position could not be equated to UK citizens, none of whom were "qualifying children", and who might reasonably be expected to leave.

11. I reserved my decision.

12. Neither party referred directly to *Agyarko* [2017] UKSC 11. Perhaps most pertinent is ¶57:

> That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

13. Although the Judge was said to have not got the law "quite right" at ¶19, I see no meaningful distinction between his self-direction and the case law, now including *Agyarko*.

14. I also note *Muhammad Arslan Khan* [2016] CSIH 13 per the Lord President at ¶13:

> It is important not to over-complicate the exercise which the immigration tribunals require to carry out … Elaborate re-statements of multi-facetted tests are seldom necessary at first instance level.

15. Point by point, the SSHD made criticisms of some force, but in the end, that was only reargument of one side of the case. The decision might have benefited from

individual analysis of the factors specified in part 5A of the 2002 Act, rather than by brief reference at the end of ¶25 (cf. *Lama*). However, I prefer the overall reading advanced by Mrs Farrell. The judge's comments at ¶24 are along the way to his decision, which is eventually reached by an overall assessment. That does not turn essentially on the medical treatment available to Benny, but above all on the fact that other family members have leave to remain. Although the SSHD argued that was irrelevant, and submitted that the outcome made more of their status than the appellant was entitled to expect, there is obvious tension between granting leave to the mother and children and not to the father of the family.

16. The relationship with a UK citizen child was not supported by much evidence, but that was an additional element, and the judge was justified in saying that further contact would be "exceptionally difficult", if the appellant was living in DRC and the child in England. The child is young. Visits by the appellant to the UK after removal seem unlikely. There was nothing to suggest the child might visit the DRC. It is not shown that the Judge made any more of this than he should have.

17. The test as formulated by the Judge at ¶19 is no less than required by the case law, including *Agyarko*. He found "a highly unusual set of circumstances" at ¶25. He continued by saying that "it cannot be said that it is proportionate for the appellant to return", which may go rather far in suggesting there could be only one rational outcome; but the judgement that the public interest should yield was open to him. As in *Lamas* (¶47) the judgement may have been "never clear cut and … positioned in close proximity to the notional borderline", but it is not one which discloses error of law, such as to justify setting it aside.

18. The decision of the First-tier Tribunal shall stand.

19. No anonymity direction has been requested or made.

11 August 2017
Upper Tribunal Judge Macleman