Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/05576/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2017	**On 12 December 2017**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

INNOCENT IBE CHUKWUMA

Respondent

Representation:

For the Appellant: Mr. I. Jarvis, Home Office Presenting Officer

For the Respondent: The Appellant appeared in person and was no longer legally represented

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent, who was born on 21 January 1974, is a national of Nigeria. He entered the United Kingdom on a multi-entry student visa, which was valid from 15 June 2005 to 31 October 2006. He applied for further leave in the same capacity on 30 October 2006 and he was granted further leave until 30 November 2007. He applied for leave on compassionate

grounds on 26 November 2007 but his application was refused on 14 February 2008. He made an application for leave to remain, as a student, on 22 February 2008 but his application was refused on 1 March 2008.

2. He made a further application for leave to remain as a student on 5 March 2008 and on 8 April 2008 he was granted leave to remain until 28 February 2009. His leave was subsequently extended in this capacity until 31 July 2010. He applied for further leave to remain as a Tier 1 Highly Skilled Post-study migrant on 27 July 2010. His application was refused. He made a further application in the same capacity on 9 April 2011 but withdrew it on 16 June 2011. By that time, he had made a further application in this capacity on 9 May 2011 and he was granted leave in this capacity until 1 July 2013. A further application, made on 12 July 2013, was refused on 2 September 2013.

3. On 14 November 2013 he was served with a notice of removal as an overstayer and on 13 December 2013 he applied for asylum. His application was refused on 21 January 2015 but on 11 February 2016 the Appellant agreed to reconsider the Respondent's claim. She then refused his claim on 17 May 2016.

4. He appealed and his appeal was allowed by First-tier Tribunal Judge Andonian in a decision promulgated on 20 July 2017 on the basis that refusing him leave amounted to a breach of Article 3 of the European Convention on Human Rights. The Appellant appealed on 1 August 2017 and First-tier Tribunal Judge Saffer granted her permission to appeal on 17 August 2017.

ERROR OF LAW HEARING

5. The appeal was previously listed before me on 13 October 2017. On that occasion I adjourned the hearing and gave directions to the Secretary of State for the Home Department to respond to the Respondent's Rule 24 notice, which cross appealed on the basis that First-tier Tribunal Judge Andonian had failed to consider the Article 8 case advanced by the Respondent.

6. The Appellant wrote to the Upper Tribunal on 22 November 2017. She stated that "having considered the Rule 24, as well as the unchallenged findings of fact in relation to the [Respondent's] medical condition, the evidence supplied to the FTT and her own guidance,

the Secretary of State does not oppose the [Respondent's] cross appeal, and invites the Tribunal to allow the cross appeal on Article 8 grounds, with specific reference to paragraph 276ADE(1)(vi) and the Secretary of State undertakes that leave will be granted in accordance with that.

7. On 30 November 2017 the Respondent wrote to the Upper Tribunal, stating that he accepted the Secretary of State for the Home Department's written proposal to grant him leave to remain on Article 8 grounds. He also invited the Upper Tribunal to address the Secretary of State for the Home Department's article 3 appeal as it sees fit. In response to a query by the Respondent, the Home Office Presenting Officer undertook to try to ensure that leave was granted to the Respondent within six weeks.

ERROR OF LAW DECISION – ARTICLE 8 OF THE ECHR

8. In his Rule 24 notice the Respondent submitted that First-tier Tribunal Judge Andonian had failed to consider whether any breach of Article 8 of the European Convention on Human Rights would arise. This was despite the fact that the Appellant had given detailed consideration to Article 8 in paragraphs 67 to 76 of her decision, dated 17 May 2016. In his grounds of appeal, dated 21 May 2016, the Respondent submitted that his removal would breach his human rights under Article 8, on the basis of his right to continue to enjoy a private life in the United Kingdom. It is clear from paragraph 1 of the decision of First-tier Tribunal Judge Andonian that there was an appeal on private life grounds before him but the decision was restricted to a consideration of the Respondent's rights under Article 3 of the European Convention on Human Rights.

9. Both parties agree that this amounted to a material error of law in First-tier Tribunal Judge Andonian's decision. They also accepted that for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules, the Respondent is over 18, has lived in the United Kingdom for less than 20 years and that there would be very significant obstacles to his integration in Nigeria due to his medical condition.

10. The medical evidence confirmed that the Respondent had had a kidney transplant on 29 July 2010 when his brother donated one of his own kidneys to him. As a consequence, he is

required to take anti-rejection medication and a long-term prophylactic for the urethral stricture which initially caused his kidneys to fail. This was not contested by the Appellant.

11. Paragraph 2.6.3 of the Country Information and Guidance on Nigeria noted that there are only seventy dialysis units in Nigeria and that most of them are in the south-west of the country and in Abuja. In addition, it was said that many of the units were equipped with old refurbished machines with no available spare parts and very little technical backup resulting in frequent breakdown of these machines and that few are staffed by trained nephrology nurses and technicians. It also noted that the picture was further complicated by the frequent power fluctuations and outages in the country, that dialysis was largely unregulated and that there were no minimum standards for the care provided. As a consequence, there would be very significant obstacles to the Respondent maintaining a private life in Nigeria.

ERROR OF LAW – ARTICLE 3 OF THE ECHR

12. The Appellant had appealed against the decision by First-tier Tribunal Judge Andonian on the basis that the threshold for finding a breach of Article 3 of the European Convention on Human Rights was that established in *N v UK* (2008) 47 EHRR 39, where it was held that:

"The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the 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 the applicant was critically ill and appeared to be very close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family willing or able to care of him or provide him with even a basic level of food, shelter or social support".

13. First-tier Tribunal Judge Andonian relied on paragraph 183 of the more recent case of *Paposhvilli v Belgium* (Application No. 41738/10), which states that:

"The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N v United Kingdom* which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously will person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy".

14. Section 2 of the Human Rights Act 1998 states that:

"(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights"**.**

15. However, in paragraph 48 of *Manchester City Council v Pinnock* [2011] UKSC 6, Lord Neuberger held that:

"This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g *R v Horncastle* [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the EurCtHR: *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham* [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" EurCtHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line".

16. There was no such clear and consistent line of decisions which was in accordance with the decision in *Pasposhivilli.* First-tier Tribunal Judge Antonian failed to take this into account or explain the basis upon which he could apply *Paposhvilli*, which was a case heard in the Grand Chamber. This was a material error of law in First-tier Tribunal Judge Antonian's decision. As a consequence, the decision by First-tier Tribunal Judge Antonian, which was based on his analysis of Article 3 of the European Convention on Human Rights, cannot stand.

DECISION BY THE UPPER TRIBUNAL ON ARTICLE 8 GROUNDS

17. Having found an error of law in First-tier Tribunal Judge Andonian's decision, I have retained the Respondent's appeal in the Upper Tribunal.

18. Furthermore, for the reasons given in paragraphs 8 - 11 above, I find that it was a breach of Article 8 of the European Convention on Human Rights to fail to grant the Respondent leave to remain under paragraph 276ADE(1)(vi) of the Immigration Rules.

DECISION

(1) There was an error of law in relation to First-tier Andonion's decision relating to Article 3 of the ECHR and this part of his decision is set aside.

(2) The Respondent's cross appeal on Article 8 grounds is allowed on the basis that the failure to address Article 8 of the European Convention on Human Rights amounted to a material error of law.

(3) The cross-appeal is retained in the Upper Tribunal and is allowed under paragraph 276ADE(1)(vi) of the Immigration Rules.

(4) It is noted that the Secretary of State for the Home Department has undertaken to grant the Respondent leave to remain under paragraph 276ADE(1)(vi) of the Immigration Rules.

Signed

Nadine Finch

Upper Tribunal Judge Finch Date 11 December 2017