
**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/07593/2016**

**THE IMMIGRATION ACTS**

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| **Heard at** North Shields | **Decision & Reasons Promulgated** |
| **On** 31 August 2017 | **On 6 September 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SHAKIRAT MOJISOLA AHMED**
**(NO ANONYMITY DIRECTION)**

Respondent

**Representation:**
For the Appellant: Ms R Petterson, Senior Home Office Presenting Officer
For the Respondent: Ms S Rogers, Immigration Advice Centre Ltd

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Greasley, promulgated on 30 January 2017, which allowed the Appellant's appeal on article 3 & 8 ECHR Grounds.

Background

3. The Appellant was born on 3 January 1989 and is a national of Nigeria. The appellant initially claimed asylum on 14 April 2014. Her claim was refused on 25 July 2014. She unsuccessfully appealed that decision and her appeal rights were exhausted on 14 August 2015. On 27 June 2016, the appellant submitted further submissions which led to a decision by the Secretary of State dated 4 July 2016 refusing the appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Greasley ("the Judge") allowed the appellant's appeal on article 3 and 8 ECHR grounds.

5. Grounds of appeal were lodged and on 1st June 2017 Judge Davies gave permission to appeal stating

> 2. It is arguable that the Judge has not properly considered all the evidence when concluding the appellants could not afford the cost of healthcare and thus made an error of law.
>
> 3. It is also arguable that the Judge did not properly interpret all the available caselaw available when concluding that the circumstances relating to the child in need of medical treatment amounted to exceptional circumstances. There is nothing in itself to indicate that a sufferer from sickle cell anaemia (SCA) is exceptional.
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> 4. It is arguable that removal of the child suffering from SCA to Nigeria, where treatment for that condition is available, cannot engage Article 3 and thus the Judge made an error of law.
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> 5. It is arguable that the Judge gave insufficient weight to the public interest considerations he was required to take into account.
>
> 6. The grounds and the decision do disclose an arguable error of law.

The Hearing

6. (a) Ms Petterson, for the respondent, moved the grounds of appeal. She told me that the background to this case is that the appellant's application for asylum was refused, she unsuccessfully appealed against that refusal and her appeal rights were exhausted in 2015. The appellant made further representations which led to the respondent's decision of 4 July

2016, which is the subject matter of this appeal. At [11] of the decision it is recorded that the appellant abandoned her protection claim and that this appeal proceeded solely on arguments relating to the appellant's young child's diagnosis of sickle cell anaemia, which were advanced on article 3 and 8 ECHR grounds.

(b) Ms Petterson told me that the Judge failed to engage with the availability of treatment for sickle cell anaemia in Nigeria. She took me to [30] of the decision, where the Judge refers to a letter reproduced at D3 of the PF1 bundle. She told me that that letter related to the cost of bone marrow transplant & post-transplant treatment, and that the Judge had misinterpreted the content of the letter and placed undue weight on it. She told me that the findings at [30] of the decision affected the Judge's findings between [34] and [39] of the decision. She told me that that between [34] and [39] the Judge accepts an assertion that neither of the child's parents will find employment in Nigeria. She told me that there is no evidential basis for that finding, so that the Judge's finding proceeds on assumption.

(c) Ms Petterson told me that the Judge's assessment of article 8 ECHR grounds of appeal is inadequate. The assessment is found between [38] and [40] of the decision. She told me that the Judge does not properly take account of the public interest and has not applied section 117B of the 2002 Act. She told me that the Judge's approach to article 8 is infected by the errors made in the assessment of article 3 ECHR grounds. She told me that the Judge failed to take account of the precarious nature of the family and private life established by the appellant.

(d) Ms Petterson urged me to set the decision aside and substitute my own decision dismissing the appeal.

7. (a) For the appellant, Miss Rogers told me that the decision does not contain errors, material or otherwise. She told me that this case has exceptional features because the appellant's child is so young. He was only two years of age at the date of hearing. She told me that there is a distinction between the treatment of children and the treatment of adults in assessing article 3 medical cases and relied on R(on the application of SQ(Pakistan) and Another v UTIAC 2013 EWCA Civ 1251 and E v Chief constable of the Royal Ulster Constabulary (2009) 1 AC 536.

(b) Ms Rogers told me that the Judge's comprehensive assessment of the evidence in this case starts at [12] of the decision. She told me that the Judge carefully applies the correct caselaw and considers the medical evidence in this case, as well as the background materials, before drawing conclusions about the availability of treatment in Nigeria. She told me that the argument advanced is not solely about sickle cell anaemia, but is about the severe episodes of treatment which are urgent and vitally necessary. She told me that the needs of a two-year-old child are significantly different to those of an adult, but conceded that the diagnosis

of sickle cell anaemia, in itself, is not sufficient to engage articles 3 and 8. Ms Rogers told me that there are exceptional circumstances in this case which engage articles 3 and 8.

(c) Ms Rogers told me that the Judge carried out a full and complete article 8 proportionality assessment and, at [40] of the decision, clearly factors the mandatory requirements of section 117B of the 2002 Act into his decision. She told me that the decision does not contain errors of law and urged me to allow the decision to stand.

Analysis

8. At [11] of the decision, the Judge says that the determinative issue in this case is a diagnosis of sickle cell anaemia in the appellant's son, who was born on 16 October 2004. Between [12] and [27] the Judge summarises the documentary and oral evidence placed before him. Between [30] and [32] the Judge considers the documentary evidence setting out the nature and effect of the symptoms suffered by the appellant's son and the availability of medical treatment in Nigeria. At [34] he concludes that article 3 is engaged because the appellant's son is only three years of age and that access to medical treatment will be limited both by availability and expense. The Judge takes account of the high rates of childhood mortality reported in the American Journal of preventive medicine.

9. I have the appellant's witness statement dated 6 January 2017 which says the appellant's son's most recent hospital admission was in July 2016. The appellant says that her son has been admitted to hospital up to 7 times in his young life.

10. Reliance is placed on a letter from South Tees Hospital dated 4 September 2015 which confirms a diagnosis of sickle cell disease. The appellant produces a letter from a consultant haematologist dated 14 August 2015 confirming the diagnosis and saying that at that time treatment was by oral medication – penicillin & folic acid. That is the extent of the medical evidence.

11. At [33] of the decision the Judge finds that the child's condition is

> "life-threatening with serious complications."

At [35] and [36] of the decision, the Judge considers caselaw and finds that the high threshold for article 3 medical cases set out in N v SSHD applies to adults, not children.

12. In GS (India); EO (Ghana); GM (India); PL (Jamaica); BA (Ghana) and KK (DRC) 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 v United Kingdom (1997) 24 EHRR 423. In that case the claimant was critically ill and 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.

13. In R(on the application of SQ(Pakistan) and Another v UTIAC 2013 EWCA Civ 1251 a 16-year-old had a serious blood disorder which required him to have transfusions every week without which he would die from severe anaemia and associated heart failure. The Court of Appeal found that the high threshold for article 3 was not reached because he would not be returning to an early and solitary death and he had been treated in Pakistan before: but accepted that there were circumstances in which the threshold would be reached in relation to a child where it would not be reached in the case of an adult.

14. In AE (Algeria) v SSHD [2014] EWCA Civ 653 the Claimant's six-year-old daughter had spina bifida and was very severely disabled with severe learning difficulties and extremely complex needs. The case concerned the application of Articles 3 and 8 when it was proposed to remove a very sick child to a home country where available healthcare provision was substantially inferior, but where the evidence did not point to the likelihood of an early death. The arguments regarding Article 3 of the ECHR could not succeed any more than they could in SQ (Pakistan).

15. In Yoh-Ekale Mwanje v Belgium 2013 ECHR 10486/10, six of the seven judges expressed the hope that the Grand Chamber would one day revisit the high threshold in health cases set out in N. However, that has not yet happened. In relation to a child, Article 8 might be more protective than Article 3. The appeal was remitted for legal error but the Court of Appeal said that along with the best interests of the child, the tribunal would have to consider the overstaying of the children and their mother, the illegal entry and bogus asylum claims of the Claimant and the future cost and duration of treatment and care in the UK.

16. In Paposhvili v Belgium (application no 41738/10) the Grand Chamber of the Court of Human Rights reiterated the principle that aliens who were subject to expulsion could not in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical or similar forms of assistance provided by that State. Suffering which flowed from naturally occurring illness would attain the minimum level of severity required by Article 3 ECHR only under very exceptional circumstances. However the Court considered that the practice since the judgment in N v United Kingdom of only applying Article 3 where the person facing expulsion is close to death, has deprived aliens who are seriously ill, but whose condition is less critical of the benefit of Article 3. Other very exceptional cases which may raise an issue under Article 3 should be understood to be situations involving the removal of a seriously ill person in which substantial grounds had been shown for believing that

he/she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment, or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his/her state of health resulting in intense suffering or to a significant reduction in life expectancy.

17. The Judge's decision contains a material error of law. The Judge deals with this appeal as if it is the appellant's sons article 3 appeal. It is not. It is the appellant's appeal. The circumstances of the appellant's son are relevant to the appellant's article 8 ECHR grounds of appeal only.

18. It is at [11] of the decision that the Judge takes a wrong turn. At [11] of the decision the Judge records that the appellant abandons her asylum and humanitarian protection claims. What that leaves is the appellant's article 8 ECHR grounds of appeal. The circumstances of the appellant's family members, including her young son, are relevant to that appeal, but abandoning the asylum and humanitarian protection grounds of appeal does not create an independent appeal for the appellant's son. The Judge was therefore wrong to allow the appeal on article 3 ECHR grounds. When he did that, he effectively allowed an appeal for the appellant's son - an appeal which was not before him.

19. At [7] of the decision, the Judge reminds himself of Devaseelan (2002) UKIAT 00702. At [10] the Judge refers to the adverse credibility findings made against the appellant, which still stand. The appellant has been found to be an incredible and unreliable witness, yet the Judge unquestioningly accepts the appellant's evidence that she has no prospect of employment in Nigeria and no family members there. The fulcrum of this appeal concerns access to medical treatment, yet the Judge accepts that the appellant, who is not yet 30 years of age, cannot find employment or support in Nigeria on the appellant's word alone, even though his starting point is that the appellant has previously not told truth.

20. The Judge's finding at [37] that medical treatment is neither available nor accessible in Nigeria is not safe.

21. The Judge's article 8 assessment is contained between [38] and [40] of the decision. [40] of the decision clearly contains a material error of law. The Judge failed to properly apply section 117B of the Nationality Immigration and Asylum Act 2002, which says

> Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

22. The only factor in favour of the appellant which can be taken from s. 117B of the 2002 Act is that she speaks English. She is not financially independent. She entered the UK in 2012 and her presence in the UK since then has been precarious. None of the appellants children are qualifying children.

23. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

24. At [39] the Judge finds that article 8 is engaged because of the appellant's youngest child's medical condition. His findings there are

infected by the error made from [11] onwards in the decision. The Judge treats this case is if it is the appellant's child's own independent article 3 ECHR appeal.

25. I therefore find that the decision is tainted by material error of law and must be set aside.

26. I consider whether I can substitute my own decision, but find that I cannot. None of the Judge's findings of fact can stand. This case requires an entirely new fact-finding exercise.

Remittal to First-Tier Tribunal

27. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

28. In this case I have determined that the case should be remitted because the Judge's findings of fact cannot stand. A new fact-finding exercise is necessary, encompassing the nature, extent and effect of the appellant's son's illness, and access to available treatment in Nigeria.

29. I remit the matter to the First-tier Tribunal sitting at Bradford to be heard before any First-tier Judge other than Judge Greasley.

**Decision**

**30. The decision of the First-tier Tribunal is tainted by a material error of law.**

**31. I set aside the Judge's decision promulgated on 30 January 2017. The appellant's appeal is remitted to the First-tier Tribunal to be determined of new.**

Signed Paul Doyle Date 4 September 2017
Deputy Upper Tribunal Judge Doyle