Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09700/2017

THE IMMIGRATION ACTS

Heard at Field House
On 23rd November 2018

Decision & Reasons Promulgated
On 31st December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

M G K A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the appellant: Ms L. Kenny, Home Office Presenting Officer
For the respondent: Ms C Bexson, Counsel, instructed by Mordi and Co

DECISION AND REASONS

Introduction

1. Although this is the Secretary of State's appeal, for convenience I will refer hereinafter to the parties as they were in the First-tier Tribunal.

2. The Secretary of State has been given permission to appeal the decision of First-tier Tribunal Judge Ripley who, in a decision promulgated on 12th September 2018, allowed the appellant's appeal on human rights grounds.

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3. The essential facts are uncontentious. The appellant is a Nigerian child born on 11 June 2012. He has major health issues, including cerebral palsy; hydrocephalus, epilepsy and global developmental delay.

4. On 1 November 2014 his mother brought him to the United Kingdom along with his sister, then aged 11, to visit his father. His father was seriously ill and subsequently died on 5 December 2014. The judge accepted that when the family came to the United Kingdom it was not for the purpose of accessing treatment but was too visit the appellant's terminally sick father.

5. Three weeks after arrival the appellant suffered seizures and was admitted to hospital as an emergency. A shunt fitted in Nigeria to relieve the pressure on his brain was replaced and he was discharged.

6. The family remained and on 9 July 2015 made a human rights claim, raising articles 3 and 8, primarily based upon the appellant's health. This was refused on 15 August 2017 and the appeal against that decision was heard by First-tier Tribunal Judge Ripley.

7. By the time of the hearing the appellant's condition had stabilised and he was able to have reconstructive surgery upon his hips. The evidence was that there were no active concerns but he would require ongoing review. At hearing it was stated most individuals with shunts would require a 2nd operation during their lifetime. The judge concluded he may well require life-saving intervention in the future.

8. The judge had rejected the claim made by the appellant's mother of a falling out with family members in Nigeria or that they would not be able to assist. The judge also rejected her claim that her own family were destitute. The judge was not satisfied that antiepileptic medication was unavailable in Nigeria.

9. The judge referred to the relevant case law in medical cases and concluded that it had not been established that his return would breach article 3. At hearing I was referred to AM (Zimbabwe) & Anor v The Secretary of State for the Home Department [2018] EWCA Civ 64. The Court of Appeal confirmed that judges below the Supreme Court were bound by the decision of the House of Lords in N v United Kingdom. In relation to article 8 the judge accepted he had established a private life bearing in mind the engagement with the medical services here. The judge also found that he had no right to remain under the immigration rules.

10. At paragraph 26 the judge referred to the public interest involved, and the factors in section 117 B. The judge found because of his disabilities he was going to have difficulty integrating. His medical needs would be a significant

burden on the National Health Service and the Department of Education. The judge placed considerable weight on this cost. The judge also recorded that further to section 117 B(4), little weight to be placed upon his private life as it had been established primarily when his residence here was not lawful. The judge found that whilst the evidence about the length of overstaying was unclear it was no more than a matter of months before the application was made.

11. At paragraph 27 the judge correctly referred to the need to consider the appellant's best interests before going on to consider the proportionality of the decision. The judge pointed out the intention would be for the appellant to be returned to Nigeria along with his mother and sister and there was a possibility that relationships with his extended family there could develop.

12. The judge described his disabilities as profound (para 28) and that he would require a plethora of experts to assist. Without help he was likely to be confined to a life with minimal meaningful engagement beyond that of his family. The judge was not satisfied he would be able to access any educational facilities in Nigeria because of his disabilities. The judge also referred to the risk to his life if there were an exacerbation of his hydrocephaly, noting surgical care was very expensive in Nigeria. The judge found the family members there may be able to provide for the family's basic expenses and medication. However, they would be unable to meet the costs of surgery or the specialised services required. At paragraph 32 the judge concluded it was not in the appellant's best interest to leave the United Kingdom.

13. In terms of the overall proportionality of the decision the judge highlighted the likely future expense of caring for and educating the appellant given his complex needs. The judge saw this as a weighty factor in favour of removal. There was no suggestion of any criminality or illegal working on the part of the appellant's mother.

14. In the final paragraph, paragraph 34, the judge refers to weighing all of the factors and concluded, notwithstanding the adverse considerations in section 117B, the appellant's removal would be disproportionate.

The Upper Tribunal

15. Permission to appeal to the Upper Tribunal was granted to the Secretary of State on the basis the judge failed to have regard to the public interest factors set out in section 117 B. Whilst the judge set out the factors relating to those considerations it was arguable that the findings in paragraph 34 failed to apply those considerations in a meaningful balancing exercise.

16. At hearing, Ms Kenny submitted that the judge gave inadequate reasons for allowing the appeal. She pointed out that the appellant's mother and brother were university educated and there was medical treatment available in Nigeria. She submitted that family life could continue in Nigeria and that the judge had failed to give reasons for allowing the appeal. Throughout, particularly leading up to paragraph 33, the judge emphasised the public interest factors involved. This suggested the appeal would be dismissed and then in the final paragraph the judged apparently changed by allowing the appeal. There was no suggestion that there was any typographical error but arguably the judge had given no explanation for the conclusion that the appeal should be allowed.

17. Ms Kenny submitted that the judge had obviously had regard to the public interest considerations. She submitted this can be seen at paragraphs 25 and 26, with the judge setting out the relevant factors beginning with the language issue and the financial considerations. Similar considerations are referred to at paragraphs 33 and 34 in relation to the proportionality question. Ms Kenny argued that the public interest was very much prevalent in the judge's reasoning and so the respondent was wrong to contend the judge did not consider these. She submitted that the findings made were open to the judge.

18. She submitted that this was a very compelling case involving a child who could not walk or talk and the judge clearly considered with care the medical evidence. The judge had found that the medical treatment formed part of the appellant's private life and to interrupt this would have serious implications for his future development. The judge had referred to the decision in EA (article 8) Nigeria [2011] UKUT 00315 and Ms Kenny submitted that the judge had concluded the appellant's disabilities would seriously impede his ability to adapt to life in Nigeria despite his young age.

19. I was referred to paragraph 32 and 34 as examples of the judge balancing the child's best interests with the general public interest considerations. The judge acknowledges the cost considerations in caring for the appellant in the United Kingdom. Finally, she submitted that the grounds amounted to an attempt to reargue the case by the Secretary of State. Ms Kenny acknowledged that had the judge only looked at the medical evidence and what was best for the appellant without having regard to the public interest considerations this would have been an error of law.

Consideration

20. There are a compelling compassionate circumstances in this appeal given the appellant's health. The child has a global developmental delay. He suffers from epilepsy. He has cerebral palsy. He has hydrocephalus which has require the fitting of a shunt in Nigeria and further surgery there. Shortly after arrival in the United Kingdom he was experiencing seizures and further

surgery was carried out relating to the shunt. The medical evidence indicated that the appellant could develop a need for further surgery in relation to the shunt. This could present as a medical emergency. The appellant at the time of hearing had just had surgery on his hips. His condition now is relatively stable but the future is uncertain.

21. Basic humanity would invoke sympathy for the appellant. However, as Ms Kenny acknowledges, it would have been an error in law for the appeal to have been allowed on this basis.

22. The permission application was grounded upon the judge, in allowing the appeal, not applying the public interest considerations in section 117 B. It clearly would be wrong to say the judge did not have regard to those public interest considerations. The cited decision of Dube (ss 117 A -D) [2015] UKUT 00090 highlights that there is a statutory obligation upon judges who have regard to the specific considerations in the legislation. The Secretary of State is not suggesting the judge did not bear in mind those considerations. Rather, the challenge is that the judge, having referred to them, failed to properly apply them.

23. On an initial reading the decision appears to be leading up to a dismissal of the appeal. There is then an apparent flip in the final paragraph when the appeal is allowed. Having considered the decision in detail however it is my conclusion this is a misreading of the decision. Rather, I find it to be a carefully prepared and nuanced decision. The judge sets out the background and makes sustainable findings on contentious areas.

24. The first finding of significance is that the family did not come here to benefit from medical treatment. Rather, the judge finds the reason the family came here was to visit the appellant's father who was dying with cancer. In the course of the hearing it was explained that he was here lawfully under European Treaty provisions as an extended family member of a relative. He was working here lawfully and sending money home to his family.

25. The judge rejects the claim made by the appellant's mother that her late husband's family are unsupportive and in fact are now blaming her for his death. The judge also rejected the claim that her family in Nigeria were impoverished. The judge noted that the appellant's mother had been educated to university level. The judge acknowledged that in the normal course the starting point in considering the best interests of the children is that they be removed with their parent if the parent is not entitled to remain. But for the appellant's health issues this is a conclusion which could have been anticipated.

26. The judge considered carefully the appellant's medical condition. The judge concluded that he may well require life-saving intervention in the future but

there was no reason to expect this would be necessary in the short term. The judge found that there would be medical treatment available in Nigeria albeit at a cost. Specifically the judge found there would be antiepileptic medication. The judge found that the medical condition was not such as would satisfy the high threshold to succeed under article 3, bearing in mind that his condition was currently stable.

27. The judge acknowledged that the appellant had not been in the United Kingdom for very long. However in the circumstance, particularly in light of the medical treatment he had received here, article 8 in relation to his private life was engaged. No challenge was made to this conclusion.

28. The judge then correctly pointed out in paragraph 27 that the appellant's best interests had to be considered before engaging in the proportionality exercise. The judge concluded that if the appellant were returned to Nigeria then he would not receive the expert treatment he has been receiving here and that he would make very little progress. The likelihood was that he would be confined to a life with minimal meaningful engagement beyond that with his immediate family. He would not be able to participate in mainstream schooling. Even if there were special schooling available in Nigeria it was unlikely the appellant could avail of this given the distance and cost.

29. In the past his father had been able to pay for his medical treatment in Nigeria. The judge found that neither his paternal or maternal family in Nigeria would have access to the required level of funds to provide for the necessary medical treatment. Whilst they could provide for his basic needs they could not support him beyond this. The judge also pointed out that given his vulnerability his return would have serious adverse effects on his continued development. He would find it harder to adapt than other children who enjoy good health.

30. Perhaps unsurprisingly the judge concluded the child's best interests were to remain in the United Kingdom. The judge also referred to the progress his sister was making here. Clearly therefore that the judge correctly assessed at the outset where his best interests lay and made a finding which was clearly sustainable.

31. The judge then correctly went on to consider the wider considerations. The judge made the basic point that a comparison of the medical treatment available in Nigeria as opposed to that available in the United Kingdom was not the issue. The judge went through the factors in section 117 B. In summary those factors weighed against the appellant. The judge noted that he is unable to speak and will face difficulties integrating. He is not financially independent. The judge emphasised the significant financial burden his needs would present on the National Health Service and the Department of Education. The judge describes these as considerable factors to

weigh in the consideration of the public interest. He is not a qualifying child and his private life was established here during a period of on lawful residence albeit comparatively short.

32. The judge is required to balance those public interests against the specific interests of the appellant in considering whether the decision is proportionate. In this appeal the judge has clearly acknowledged the significant cost the appellant will be upon the public purse if he were allowed to remain. The judge does not ignore the significant public interest in his removal on this basis. At paragraph 34 the judge then steps back and weighs all the issues for and against his removal. The judge concluded his removal would be disproportionate. Paragraph 34 is brief but must be read in the context of the decision as a whole. The judge has set out all the factors in the balancing exercise in the preceding paragraphs. The judge has undoubtedly shown compassion towards the appellant and his family and the outcome could be considered generous. Nevertheless, the judge has not disregarded the public interest considerations and the conclusion was one open to the judge. Consequently, I find no material error of law established.

Decision

No material error of law is established in the decision of First-tier Tribunal Judge Ripley. Consequently, that decision allowing the appeal shall stand.

Francis J Farrelly

Deputy Upper Tribunal Judge
19 December 2018