Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18025/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2018	**On 11 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

I T O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dated 13 December 2017 dismissing his appeal against the respondent's decision of 6 July 2016 refusing him further leave to remain on human rights grounds.

Background

2. The appellant is a citizen of Nigeria born on 23 January 1983. He entered the UK on 15 December 2013 as a Tier 5 TW (Cre-sport) migrant with leave to remain valid until 7 January 2014. After his leave expired, he remained in the UK. On 16 March 2016 he applied for leave to remain on the basis of his family and private life.

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3. The respondent's decision is set out in Annex A of the decision letter of 6 July 2016. She was not satisfied that the appellant was able to meet the suitability requirements of para 276ADE(1)(i) of the Rules at the date of application as he fell within S-LTR 2.3 as someone who had failed to pay outstanding charges in respect of NHS treatment. He had been receiving dialysis treatment and had accrued a debt of £32,983. The respondent also did not accept that the appellant could meet any of the requirements of para 276ADE(iii) – (vi). He had only lived in the UK for two years and he could not show that there were very significant obstacles to his integration into Nigeria on return.

4. The respondent went on to consider whether there were exceptional circumstances which might warrant a grant of leave to remain in the UK outside the requirements of the Rules. The appellant had produced evidence that he was suffering from chronic kidney disease and had been diagnosed with end-stage renal disease and small kidneys. She accepted that the respondent was going to need dialysis for the rest of his life unless he could have a kidney transplant. According to the Country of Origin ("COI") information, treatment was available in Nigeria but having dialysis three times a week would be difficult and it would not be possible to have a renal transplant. The respondent was not satisfied that the appellant could bring himself within article 3 and there were no further factors which could be considered to be so exceptional to override the legitimate requirements of immigration control within article 8.

The Hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal the appellant confirmed that he was suffering from chronic kidney disease and having dialysis three times week. He said that if he returned to Nigeria, he would die because he could not get treatment there. His home town was Enugu and the nearest government hospital was at the University of Nssaka Teaching Hospital but there were no facilities there for dialysis. According to his research, only two government hospitals in Nigeria provided such services and they were based in Lagos and Ibadan. The judge accepted the evidence about the appellant's medical condition and the diagnosis of end-stage renal disease, but he did not accept his evidence that he had not left the UK at the expiry of his leave in January 2014 because he had been diagnosed with renal problems shortly before he was due to leave, the letter dated 21 June 2016 from South West Thames Renal and Transplantation Unit referring to the appellant being diagnosed with end-stage renal disease in May 2015 [44].

6. At the outset of the appeal, the judge had asked the appellant to clarify the basis of his human rights claim and he said that he simply wanted to make his claim based on his ill health and nothing else. The judge commented that, as it was the appellant's case that he had a partner who was pregnant with his child, he gave him a second opportunity to clarify the basis of his claim, but he reiterated that he wanted the Tribunal to consider the claim on the basis of his ill health [46].

7. The judge took no issue with the evidence the appellant had given about his private life established in this country but said that there was insufficient evidence to make any findings about his claimed relationship with a British national or any other family or private life he may have [48]. So far as the position in Nigeria was concerned, the appellant had said that he had no family, no property or assets left there but the judge did not find that he was being candid about these issues. He had come to the UK as a 30-year old in December 2013 and was only supposed to stay for a few weeks, being due to leave in January 2014. He found that it was reasonable to conclude that the appellant would have established a life for himself in Nigeria and he did not accept that by the time he had submitted his application in 2016, he had lost all material ties to that country [49-51].

8. The judge reviewed the case law about when medical grounds could give rise to a successful claim under article 3 and in particular N v Secretary of State [2005] UKHL 31 and GS India and others v Secretary of State [2015] EWCA Civ 40. He considered the impact of Paposhvili v Belgium (41738/10) ECtHR, Grand Chamber and EA (article 3 medical cases - Paposhvili not applicable) [2017] UKUT 445 on whether Paposhvili applied in the light of current domestic jurisprudence.

9. The judge accepted at [55] that the appellant had been diagnosed with end-stage renal disease and, having been operated on at an NHS hospital, he was able to survive post-operation because he attended a dialysis unit three times a week. He was not entitled to NHS treatment and both his operation and his ongoing dialysis was being paid for by the taxpayer. Unless he received a kidney transplant, he would need dialysis for the rest of his life. However, the case law did not enable the appellant to meet the very high threshold required to establish a claim under article 3 even with his serious condition and his lack of means to manage his condition in Nigeria. The judge took note of Paposhvili commenting that that judgment appeared to open up the possibility of someone in the appellant's predicament succeeding under article 3 but that ran counter to binding domestic law which had to take precedence [60]. For these reasons, the appeal could not succeed under article 3.

10 The judge went on to consider article 8 but found that, even taking his claim at its highest, the appeal could not succeed on article 8 grounds and the respondent's decision to remove was not disproportionate to a legitimate aim.

11. The judge commented finally at [68] as follows:

> "These types of appeals are amongst the most difficult which this Tribunal has to deal with. Whilst the Tribunal has every sympathy with the appellant and the difficulty which he finds himself in, the dispassionate exercise of the law means that any sympathy which the Tribunal may have for the appellant's predicament has to be put to one side. The law, as it stands, is very much against the appellant and therefore with a very heavy heart I have to dismiss his claim under both article 3 and article 8 ECHR."

The Grounds of Appeal

12. In the grounds of appeal submitted on the appellant's behalf, it is argued that the judge failed to apply the correct legal test in the light of the judgment in the

Paposhvili; failed to make findings on article 8 and in particular para 276ADE(1)(vi) and that there had been procedural unfairness in that documents submitted with the appellant's application were not brought to the attention of the Tribunal. These included his parents' death certificates and a medical report confirming that he had been diagnosed with chronic kidney disease in 2013.

13. When granting permission to appeal the First-tier Tribunal judge identified the following arguable issues: the judge had been unable to take into account evidence which the appellant had submitted to the respondent initially; in carrying out the proportionality exercise, consideration should have been given to the criteria in para 276 ADE in relation to the existence or otherwise of very significant obstacles; the reason for the suitability criteria not being met was the decline in the health of the appellant; these factors together with other matters relating to the existence of very significant obstacles were pertinent to the degree which the Rules were capable of being satisfied; the assessment of the public interest and the enforcement of effective immigration control had therefore been affected; the judge should have set out a more extensive analysis in the proportionality exercise of the factors bearing on the existence of significant obstacles; given that the appellant was unrepresented, inquiries capable of being made by the respondent in relation to specific country issues should have been utilised and, finally, given that the appellant was unrepresented there should have been a more extensive analysis of the question whether there was a breach of article 8 in respect of physical and moral integrity.

14. At the hearing before me there was no appearance by or on behalf of the appellant. I am satisfied that the notice of hearing has been properly served and there is no explanation for his failure to appear. In these circumstances, I am satisfied that the proper course is to proceed with the hearing. Mr Tufan did not seek to make any further submissions on behalf of the respondent save to remind me of the recent decision of the Court of Appeal in AM (Zimbabwe) v Secretary of State [2018] EWCA 64.

Assessment of the issues

15. I must assess whether the First-tier Tribunal erred in law such that the decision should be set aside. The first issue is whether the judge applied the correct legal test in the light of the judgment in Paposhvili. In EA, the Upper Tribunal held that the Paposhvili test was not one which was open to the Tribunal to apply as it was contrary to binding precedent set out in the House of Lords' opinions in N. This decision has been confirmed by the Court of Appeal in AM (Zimbabwe), the Court repeating at [33] that all Courts below the Supreme Court are bound by the decision in N. The Court went on to consider the effect of the judgment in Paposhvili accepting that it relaxed the test for a violation of article 3 in medical cases but only did so to a very modest extent: see [39]-[41]. However, the position remains that N is a binding authority and the judge did not err in law by taking the view that, whilst Paposhvili may have reignited the debate over the high threshold set by domestic case law, it did not affect the binding jurisprudence in the UK [69].
16. It is further argued that the judge should have made more findings in respect of article 8 and in particular para 276ADE(1)(vi). This ground is expanded in in the

grant of permission to appeal, particularly in the context of the assessment of very significant obstacles and their bearing on the analysis of proportionality. The judge may not have specifically referred to para 276ADE in his decision, but he clearly had it in mind and dealt with the relevant issues, particularly at [51] finding that the appellant had not lost all material ties to Nigeria and had not been candid about his circumstances there and was unable to show that there were significant obstacles to him integrating on return, having initially come to the UK supposedly for a few weeks and there being no adequate basis for a finding that there would be significant obstacles to him integrating into Nigeria. In short, he found that there were no significant obstacles to him returning to Nigeria over and above his medical condition.

17. The judge considered article 8 in the context of private life. The grounds raise the issue of whether there should have been a more extensive analysis in the light of the evidence about the appellant's family life, but the judge raised that issue with the appellant ([14] and [44]) and he was clear that he wished to proceed purely on the basis of grounds relating to his ill health. In these circumstances, the judge was entitled to find that there was simply a lack of evidence of family life. On the issue of physical and moral integrity, in GS (India), the Court of Appeal made it clear that if article 3 could not be met on medical grounds, article 8 would not succeed unless there was some separate or additional factual element bringing the case within the article 8 paradigm [40]. The judge referred at [40] to the comments of Underhill LJ at para 111 of GS (India) where he said,

> "First, the absence or inadequacy of medical treatment, even life preserving treatment, in the country of return, cannot be relied on at all as a fact engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may or may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle".

18. The judge accepted that the appellant had established a private life in this country but was entitled to note that this was when his leave was precarious. He considered the provisions of s. 117B of the 2002 Act and the case law referred to in [66]. I am not satisfied that any matters capable of affecting the assessment of proportionality were left out of account.

19. The grounds also raise the issue of whether there was procedural unfairness in that documents submitted by the appellant in support of his application did not come to the attention of the judge. The death certificates of his parents were included in the bundle of documents submitted by the respondent and would have been before the judge. The grounds refer to a medical report to show that the appellant was diagnosed with kidney disease in 2013 but assuming that the judge was unaware of it, I am satisfied that it would have had no bearing on the outcome of the appeal. It may have cast a different light on the judge's finding that the appellant had only been diagnosed with kidney disease in 2015 but, even assuming the diagnosis was made earlier, that would not have affected the outcome of the appeal. It was argued that, as the appellant was unrepresented, the respondent should have made

enquiries about specific country issues but there is no substance in this ground. The respondent did make such enquiries and relied on the Nigerian COI report about the treatment available in Nigeria.

20. In summary, I am not satisfied that the judge erred in law in any way capable of affecting the outcome of the appeal. He reached a decision properly open to him on the basis of the law as it currently stands.

Decision

21. The First-tier Tribunal did not err in law and its decision stands.

Signed: H J E Latter Dated: 8 May 2018

Deputy Upper Tribunal Judge Latter