Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11754/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 August 2019	**On 11 September 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

B B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Komolafe of Dele Adedeji Associates Ltd
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Zambia. He appealed to the First-tier Tribunal against the Secretary of State's decision of 9 May 2019 refusing a human rights claim.

2. The essential issue in this case concerns the appellant's health problems. He wishes to remain in the United Kingdom to continue on the course of treatment he is currently receiving for sickle cell disease. He was noted by the judge as saying that that particular treatment which he receives is not available in Zambia and having

had a stroke in 2011, he is likely to have another if his current treatment is not continued.

3. The judge noted the medical evidence and in particular the recommended form of treatment in the United Kingdom, which is exchange transfusion, by which the patient's blood is taken out from one arm while donor blood is pumped into the other arm, the purpose of this treatment being to reduce the level of sickle cell disease in the blood and among other things to reduce the risk of a stroke. It was said that the appellant required such treatment every four to six weeks. The judge accepted expert evidence that without exchange transfusions 30% of sickle cell disease patients who have had a stroke will have a further stroke. The appellant had from time to time suffered other side effects of sickle cell disease such as ulcers which had responded to medication and he takes a variety of drugs to manage his ill health or to help to maintain good health.

4. The judge found with regard to the conditions in Zambia that treatment for sickle cell disease is available and indeed, the appellant himself had received such treatment there. The available treatment includes simple red cell blood transfusions by which donor blood is pumped into the patient and the appellant confirmed that these simple transfusions also reduce the level of sickle cell disease in the blood. Medication for the treatment of sickle cell disease is available in Zambia. However, exchange blood transfusions are not available in Zambia. The judge concluded that she was not satisfied that there were significant obstacles to the appellant's relocation in Zambia. She did not accept that there would be any breach of Article 3 or Article 8 of the Human Rights Convention and said that the test to be applied was not whether the appellant could receive identical medical treatment in Zambia and it was not enough to say he could not receive exchange blood transfusions in Zambia. The evidence did not show that the consequences of him receiving the available treatment in Zambia would be such as to breach Article 3 or Article 8. None of the expert medical evidence engaged adequately with the essential question of how the appellant's health would be affected (if it would) by him changing from exchange blood transfusions to simple blood transfusions. The medical evidence provided failed to detail the frequency or risk of "iron overload" when simple transfusions were administered, failing to detail the availability or otherwise of medication to treat the problem and failing to explain the consequences for a patient if the condition went untreated. There was also no comparative data as to the respective effectiveness of exchange blood transfusion and simple blood transfusion in reducing sickle cell load in the blood. She considered this to be a fundamental gap in the evidence. The appeal was dismissed.

5. The appellant sought and was granted permission to appeal by a Judge of the First-tier Tribunal on the basis that since the judge had adverted specifically to the identification of matters to be dealt with in the course of the hearing it was arguable that if he had the view there was a fundamental gap in the medical evidence relating to a fundamental issue appertaining to the health of the appellant this should have been drawn to the attention of the representatives before the case began. It was

arguable in the alternative that unfairness had arisen in that matters in relation to which the judge considered there was a fundamental gap in the evidence were not put to the appellant.

6. In his submissions (which were augmented by a written document provided subsequent to the hearing), Mr Komolafe argued that the appellant was at increased risk of a stroke. Treatment by simple transfusion would lead to overload and the necessary drugs were not available in Zambia. The decision of the Secretary of State was clearly disproportionate on the basis of the Bank Mellat tests. The appellant was receiving treatment in the United Kingdom. Article 3 and Article 8 were engaged. The evidence was that the drug was no available in Zambia, so if forced to return the appellant would suffer serious detriment. It was always necessary to compare the situation in the United Kingdom with the other country as regards the quality of treatment as had been held in D. Treatment in the United Kingdom was better than in Zambia. In line with what had been held by the House of Lords in Beoku-Betts the Secretary of State had to consider the impact of removal on people in the United Kingdom and under EB (Kosovo) it was necessary to consider the proportionality of removal. Articles 3 and 8 were engaged.

7. In his submissions, Mr Melvin argued that it had been made clear that Article 3 was not relied on at the earlier hearing. The judge had identified this as being unlikely to succeed. There was reliance on the difference in available treatment in the United Kingdom and Zambia and this did not meet the very high threshold. The judge had made this clear at paragraph 20 of her decision. It was not a new matter today. The Secretary of State's response under Rule 24 was relied on. Authorities such as GS and SL and more recently PF were relied on, which gave clear guidance. No error of law had been identified.

8. By way of reply, Mr Komolafe argued that the judge had referred to gaps she noted and there was evidence before the Tribunal of that and this had not been disputed by the Secretary of State. The appellant was experiencing exceptional and compassionate circumstances. The decision of the judge should be set aside and the appeal should be allowed.

9. I reserved my decision.

10. Dealing first of all with the grant of permission to appeal, I do not consider that an error of law has been shown in the judge drawing attention to defects in the evidence before her. It was for the appellant's representative to anticipate any problems in the evidence in light of the case law and base the case on the relevant evidence. It is not an error of law for a judge to say that there is a fundamental gap in the evidence. It is not his responsibility to provide the evidence and nor is it his responsibility to set out concerns of that type in advance so that the gap can be filled if that is possible. The judge's reasoning is entirely cogent, clear and sound and properly in line with the authorities. The threshold is indeed a high one and the findings, in particular at paragraph 21 of the judge's decision, were clearly open to her.

11. The respondent rightly relies in particular on what was said by the Court of Appeal in PF (Nigeria) [2019] EWCA Civ 1139, which makes it clear first that the Tribunal is bound by what was said by the House of Lords in N [2005] UKHL 31, under which it has to be shown that the applicant's medical condition has reached such a critical stage that there are compelling humanitarian grounds for not removing him to a place which lacks the medical and social services which he would need to prevent acute suffering while he is dying. The evidence provided, even including the postdecision evidence attached to the grounds of appeal, falls well short of that. That most recent evidence refers to the difference between exchange transfusions and top-up transfusions and the consequences, and goes no further than saying that if the appellant were to switch back to top-up transfusions in Zambia that the specialist's feeling was that he would run into more clinical problems with repeated sickle crises and cerebrovascular events and would eventually need iron chelation therapy with deferasirox or an infusion of desferrioxamine under the skin every night for five nights a week, which would impact on his health further. Even if this evidence, which goes further than the evidence before the judge, could be taken into account, it can be seen that it falls well short of the test set out in N.

12. The Court of Appeal in PF (Nigeria) went on to consider whether the more relaxed test set out by the Court of Human Rights in Paposhvili [2017] Imm AR 867 would make any difference and concluded that it would not. The test there, as set out in AM (Zimbabwe) [2018] EWCA Civ 64, is that

> "the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely 'rapid' experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state" .

13. It can be seen again from the evidence that the facts of this case fall well short of even the Paposhvili test and therefore it would not be appropriate, not that I was asked to do this, to consider adjourning to await the outcome of proceedings in the Supreme Court considering the Paposhvili test.

14. Accordingly, I consider that it has not been shown that the judge erred in law in any respect in her decision, and her decision dismissing the appeal therefore stands.

Notice of Decision

The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 30 August 2019

Upper Tribunal Judge Allen