Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/26357/2016

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 13th November 2018	**On 27th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

H B D
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No legal representation
For the Respondent: Mr C Bates, Senior HOPO

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Malik, promulgated on 24th August 2017, following a hearing at Manchester on 4th August 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 23rd March 1998. He appealed against the decision of the Respondent Secretary of State, dated 27th June 2016, refusing his application to remain in the UK in order to continue medical treatment, from which he has up to now privately paid. He had been here together with the presence of his mother in the UK. She had, by the time of this appeal, however, returned back to Nigeria.

The Judge's Determination

3. The judge, in what is a comprehensive determination, observed how the Appellant had undergone a successful bone marrow transplant in this country, and had been receiving treatment, which was not available in Nigeria, but that given that the surgical treatment was now over, he could be required to return back to Nigeria, as the Secretary of State had decided. It was true that the Appellant needed ongoing monitoring, but this was in the form of testosterone injections, and these would be available in Nigeria. The judge acknowledged that "the treatment in the UK outweighs the availability of treatment in Nigeria, but there is treatment", such that the Appellant "could continue to receive his injections in Nigeria, more so as his treatment in the UK has been privately funded thus far and this could continue in Nigeria" (paragraph 30). The appeal was dismissed both on Article 8 grounds, and on Article 3 grounds, with due regard being given to Section 117B considerations.

Grounds of Application

4. The grounds of application state that the judge erred in failing to look at the appeal in the context of the Immigration Rules. The Appellant's medical condition necessitated that he obtained emergency treatment during his visit to the UK. That treatment and follow-up care is still ongoing. He has met the costs of the treatment entirely from his own funds. This was not a typical Article 3 appeal where the NHS care was being used, or was intended to be used, for an indefinite period of time, at public expense. Indeed, the Appellant had previously been granted leave on account of the required treatment, and his ability to be able to pay for it. That being so the Immigration Rules here did not require the application of a high threshold test which Article 3 normally implies in a case such as this. Yet, the judge had stated (at paragraph 35) that it was not the case that the "Appellant could have had any expectation that they could remain in the UK indefinitely". This was not the question. The Appellant was seeking to remain for a limited period of time, on a basis of privately funded treatment, so long as this was necessary.

5. Second, it was clear from the "FLR(O) form" that was completed by the Appellant, that he was seeking to extend his leave to remain, on the basis that it had already been granted. The Appellant plainly sought to extend his leave in the same category in which it had already been granted.

There was no specific tick box dealing with the Appellant's situation as such. The fact that the Appellant, together with his mother, sought leave to remain in the UK, was nothing to the point, because what the Secretary of State had to do was to apply the relevant Immigration Rule, whilst that had been identified. This was clear from the case of **CP (Section 86(3) and (5); wrong Immigration Rule) Dominica [2006] UKAIT 00040**.

6. Third, the judge had wrongly placed reliance upon COI materials (at paragraph 29), of her decision because this material had been produced by the Respondent in error, and the documents were largely unsourced, and amounted to no more than a series of assertions by the Respondent. The Respondent is obliged to serve evidence upon which she relies: see **UB (Sri Lanka) [2017] EWCA Civ 85**.

Grant of Permission

7. Permission to appeal was granted by the Upper Tribunal on 22nd August 2018 on the basis that it was arguable that the judge had failed to consider the application of the relevant Rule to the Appellant, namely, Appendix V, as a visitor undergoing private medical treatment. It was arguable that the basis of the Appellant's application was a relevant Immigration Rule, which had not been applied, in a way that the issue of proportionality fell to be determined in a particular way.

Submissions

8. At the hearing before me on 13th November 2018, the Appellant appeared in person and relied upon the grounds of application. He said that he had been in this country eight years. It is true that he had a bone marrow transplant. However, his treatment was still ongoing. There were complications. The Respondent's suggestion that the Appellant could return to Nigeria, and then come back every three months to have monitoring, was simply not a credible suggestion. The latest medical evidence, contained in the supplementary bundle, suggested that, because of the chemotherapy treatment that the Appellant had been subjected to, that upon return to Nigeria there was a risk of his having skin cancer. Moreover, this additional bundle also makes it clear that the Appellant's condition could relapse and cause further complications for him. The Appellant also submitted that he would place reliance on Article 8, only insofar as it was relevant to the extension of the current stay that he had already been given, because his situation was unchanged.

9. For his part, Mr Bates submitted that the Appellant would fail under Article 3 because this is a very high threshold. What one was looking at in such cases was a "deathbed scenario" and this was not such a case. The Appellant had undergone surgical treatment. The surgery had been successful. He needed monitoring but there was no reason why this could not be done in Nigeria. The essence of the follow-up treatment was that he needed testosterone injections, but as the judge had made clear (at paragraph 30) these would be available in Nigeria, and all the more so,

because the Appellant was privately funded in his treatment, which would be equably possible for him to procure in Nigeria. The Appellant was now in a long-term recovery phase. It could not be suggested that he should remain here indefinitely. If the judge had overlooked any of the evidence furnished on behalf of the Appellant, this was immaterial, because the failure was not such as to put the Appellant at risk, given that treatment would be available for recovery care in Nigeria. Indeed, in August 2018 the Appellant's mother had returned back to Nigeria. This was why this was simply the Appellant's appeal. His mother and other family relatives would be there to assist him with any help or care he needed. Article 3, therefore, could not assist the Appellant. As for Article 8, the judge had properly decided this matter (from paragraph 34 onwards) and taken into account the Section 117B considerations whereby the public interest was served by the maintenance of strict immigration control.

10. In reply, the Appellant, stated that he still needs a hip replacement, and this is clear from the doctor's evidence. The latest letter of 17th August 2017 makes it clear that he is at risk of skin cancer, and this is not referred to by the judge. The Appellant submitted that in 2015 he was granted discretionary leave to remain, because this was the particular route that his family had chosen for him to come to the UK, and he had succeeded on that basis. Leave to remain had been granted. So long as the current medical treatment was continuing, he was entitled to have the same leave extended again.

Error of Law

11. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law, such that I should set aside the decision and remake the decision. My reasons are as follows.

12. First, this is a case where the judge has not taken into account all of the evidence that was put on behalf of the Appellant in relation to his claim. The evidence in the bundle from Rochdale Legal Enterprise, dated 1st August 2017, included documentation from the Central Manchester University Hospitals, which very early makes it clear, even on 14th March 2016, that "a return to Nigeria could jeopardise the ground breaking and very costly medical treatment that Hassan has undergone".

13. It also goes on to say that,

> "The follow-up outlined above would not be accessible in Nigeria, particularly as a very prompt response by medical and nursing staff with the necessary specialist knowledge of post-transplant complications and treatment is not available in his home city, Kano."

14. The judge does not take this evidence into account. It is true that in a subsequent letter of 27th October, there is reference made to testosterone treatment, and that this the judge has taken into account. The letter of 22nd June 2017 also makes it clear that, "it is more likely that he will need

testosterone treatment long term", and the judge is correct (at paragraph 30) to say that testosterone injections would now be available to the Appellant in Nigeria.

15. Nevertheless, there is no reference thereafter to what was said in the letter of 23rd June 2017 which is that, "he is on ongoing follow-up and required to have continuing bone marrow transplant long-term follow-up and endocrine and orthopaedic follow-up. He is likely to require orthopaedic surgical intervention". This is not taken into account by the judge.

16. It is also now, of course, the case that the Appellant points to a risk of skin cancer, on account of chemotherapy treatment that he has had, which needs to be taken into account.

17. Accordingly, in all these respects, it was important, not only that the evidence be fully taken into account (and here I say no more than that the judge below should have taken into account all the evidence that was available *at that time* before the Tribunal rather than the latest evidence that has now been produced before me) but also that consideration should have been given to Appendix V, in relation to the very discreet area of visitors who are undergoing private medical treatment, because a different set of considerations apply here, and not least in relation to the issue of proportionality, and such an evaluation has simply not been undertaken.

18. There has been a delay in sending out this Determination to the parties concerned, because although it was dictated on the day of the Hearing, and typed up shortly thereafter, it appears to have been held up in the system, before promulgation.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. I set aside the decision of the First-tier Tribunal. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Malik pursuant to Practice Statement 7.2(b) of the Practice Directions.

20. An anonymity direction is made.

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 their 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.

21. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 25th February 2019