Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01195/2019 (P)

THE IMMIGRATION ACTS

Decided without a hearing **Decision & Reasons Promulgated On 30 July 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MICHAEL [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

1. The appellant is a Nigerian national who was born on 19 July 1977. He appeals against a decision which was issued by First-tier Tribunal Judge Higgins ("the judge") on 5 August 2019, dismissing his appeal against the respondent's refusal of his application for a residence card as the extended family member of an EEA national.

Background

2. The appellant arrived in the UK in 2010. He had suffered a serious car accident in Nigeria in 2008. That accident left him with a range of health conditions, the most notable aspects of which are epilepsy, severe sight impairment and

panhypopituitarism (reduced hormonal secretions from the pituitary gland). The appellant's epilepsy is under control and his last epileptic seizure was in 2018. He has no perception of light in his right eye and the vision in his left eye is assessed as 6/9. He requires a range of hormonal medication, including regular injections, for his panhypopituitarism.

3. It is common ground that the appellant requires some assistance in his daily life as a result of his ill health. In 2013, having failed to secure leave to remain under the Immigration Rules, he made an application for leave to remain, submitting that his expulsion would breach Article 8 ECHR. That application was refused without a right of appeal, as were further submissions in reliance on Article 8 ECHR. He made an asylum claim in 2014 but he withdrew it a few months later. Then, in February 2015, he submitted to the respondent that his removal would be in breach of Articles 3 and 8 ECHR. That application was refused and the appellant appealed to the FtT. This appeal was heard by Judge Aspden, who dismissed it in a lengthy and detailed decision dated 27 January 2016.

4. At that stage, the appellant was living in Liverpool with his sisters, both of whom are medical practitioners. It was submitted to Judge Aspden that the appellant was so dependent upon them that the withdrawal of their care by his removal to Nigeria would give rise to a breach of the ECHR. Judge Aspden accepted that the appellant was dependent upon them to a significant degree, in that he lived in their home and they cooked for him, laundered his clothes, and gave him help with his medication: [38]. Having noted, amongst other matters, the absence of evidence that such care would not be available in Nigeria, Judge Aspden found that the appellant's case did not come close to meeting the high threshold in Article 3 ECHR: [44]. She accepted that the relationship between the appellant and his sisters engaged Article 8 ECHR in its family life aspect but found that it would be proportionate to interfere with that relationship. In so finding, she attached significance to the possibility of alternative care being arranged in Nigeria and to the appellant's sisters making financial arrangements for such care. She also noted that the appellant had no right to remain in the UK and that his presence presented a significant drain on the public purse, through the NHS, as a result of which she considered there to be a public interest in his removal which outweighed the severity of any consequences he would experience.

5. On 4 October 2017, the appellant made an application for a Residence Card under the EEA Regulations. (A previous application of that nature was made in 2016 but the details of it are not before me). The appellant submitted that he satisfied the requirements of regulation 8(3) of the Immigration (EEA)

Regulations 2016 ("a relative of an EEA national [who,] on serious health grounds, strictly requires the personal care of the EEA national."). The EEA national in question was said to be the appellant's cousin, [JO], a qualified nurse with an Upper Second Class degree in Intellectual Disability Nursing from Ireland's Waterford Institute of Technology. It was submitted that the appellant had been living with Mrs [O] and her family in Basildon, Essex, since 2017.

6. The application was initially refused without a right of appeal in June 2018. As a result of judicial review proceedings, however, the respondent agreed to reconsider her decision.

7. On enquiry from the respondent in 2019, the appellant's sisters and Mrs [O] wrote letters explaining that the latter had taken responsibility for his care in 2017. It was said that she was better placed to do so as a result of her medical qualifications, her stable family setting and her close family relationship with her.

The Respondent's Decision

8. The respondent refused the appellant's application on 22 February 2019. The decision spans six pages of single-spaced text and I need not rehearse its contents. It suffices for the present to reproduce the summary of the respondent's conclusions which appears on page 3:

> "However, you have not provided adequate evidence demonstrating that you have serious health issues that strictly require the personal care of your EEA national sponsor. The reasons for this are:
>
> - You have submitted a simple medical report which fails to fully detail your medical condition. Further, it does not specify the type and level of care your require.
>
> - You have not provided any evidence which would show that you require personal care on an everyday basis."

The Appeal to the First-tier Tribunal

9. The appellant gave notice of his appeal to the First-tier Tribunal on 7 March 2019. That appeal came before the judge on 17 June 2019. The appellant was represented by counsel, the respondent by a Presenting Officer. The judge heard evidence from the appellant and Mrs [O] and submissions before both representatives before reserving his decision.

10. The judge's reserved decision is carefully structured. He set out the appellant's immigration history, including the decision

reached by Judge Aspden, in detail at [2]-[15]. He summarised the appellant's applications under the EEA Regulations at [16]-[20]. At [21]-[27], the judge summarised the respondent's decision before detailing, at [28]-[41], the oral and documentary evidence before him. The judge reached findings of fact at [42]-[53]. Those findings were then carried forward into his conclusions, which it is necessary to set out in full:

> "[54] I turn then to the requirements in reg 8(3). A potential extended family member's requirement of personal care must be on "significant health grounds". The AIT concluded in TR (above) that what it termed ordinary ill health was insufficient to engage reg 3 [sic]. What an applicant has to show is that his ill health is significantly more serious than that. The appellant's epilepsy is, for the most part, controlled. His panhypopituitarism and associated problems, and the effects of the treatment they necessitate, may well have a significant impact on the appellant's quality of life, but he has adduced no evidence as to what that effect is in his case. The condition which most obviously limits what he can and cannot do is his impaired vision. He has some residual vision in his left eye, but his sight has been assessed as severely impaired. Ill health comes in many forms. The conditions from which the appellant suffers are permanent and distinctive, and taken together, I am satisfied their consequences may be said to be significantly more serious than the consequences most commonly associated with ill health.
>
> [55] Personal care in this context, the AIT observed in TR, must be such that, without it, the individual concerned would be unable to function in a meaningful way. That cannot be said of the support provided by Mrs [O]. She and her family have made the appellant welcome in their home and he benefits from their companionship and their domestic routines. Mrs [O] administers his daily injection. She checks to ensure he has not avoided taking medication so as not to suffer its side effects. She ensures he is fed and clothed, and she and her family accompany him on shopping outings, visits to the GP and hospital appointments. The support Mrs [O] provides is of considerable value to the appellant. But he is able to meet his basic needs himself as is evident from the fact that he has been able to conduct a relationship and been prepared to consider starting a family with his partner. The support provided by Mrs [O] has not been necessary to enable him to function and the appellant has not satisfied me in amounts to personal care for the purposes of reg 8(3) .

> [56] Were I wrong about that, and were the support the appellant is offered by Mrs [O] sufficient to constitute personal care for the purposes of reg 8(3), I do not accept the support Mrs Ola provides is "strictly required" by him. The AIT commented in TR that the inclusion of the words strictly in reg 8(3) serves to underline the exacting nature of the requirement that needs to be demonstrated. The appellant's contention that he strictly requires Mrs [O]'s personal care is not easily reconciled with the fact that he has been able to conduct a committed relationship with a partner over an extended period, and he has not satisfied me the high threshold embodied in reg 8(3) is met in his case.
>
> [emphasis added]

The Appeal to the Upper Tribunal

11. The appellant's grounds of appeal to the Upper Tribunal focus upon the underlined words in the judge's conclusions. It is submitted in the grounds that the judge's conclusions were irrational insofar as he concluded that the appellant was able to meet his basic needs because he had previously been in a relationship and thought about starting a family. Although permission to appeal was refused by the FtT, it was granted on renewal by Upper Tribunal Judge Grubb, who considered it arguable

> "that the judge reached an unsustainable finding on reg 8(3) that personal care was not strictly required from the sponsor given the appellant's condition (severe sight impairment) which the judge found to be "serious health grounds" and his current need for day-to-day support. The finding is arguably irrational based, as it is, upon the fact of a past relationship."

12. The respondent filed no response to the notice of appeal in compliance with rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the 2008 Rules").

13. The appeal was listed to be heard at Field House on 31 March 2020. On 20 March, however, the nation entered 'lockdown' as a result of the global pandemic and all hearings were adjourned sine die. The papers were accordingly placed before me on 31 March in order to decide whether the appeal might nevertheless be progressed in some way. My provisional view, having considered the papers, was that the question of whether there was an error of law in the judge's decision might be determined without a hearing. On that day, therefore, I drafted directions to the parties which were designed to elicit, firstly, whether there

was any legitimate objection to deciding that question without a hearing and, secondly, any additional submissions which the parties sought to make on the appeal.

14. Due to staffing constraints at Field House as a result of the pandemic, my directions were not sent to the parties until 6 May. They were sent by email to an email address notified to the Upper Tribunal by the respondent for service of such directions and to two email addresses given by the appellant's representatives, Hazelhurst Solicitors of Manchester, in correspondence with the Immigration and Asylum Chamber. The time for responding to all directions expired 28 days later, on 3 June. Neither party responded to the directions.

15. Rule 34(1) of the 2008 Rules confers a discretion upon the Tribunal to make any decision without a hearing. By rule 34(2), it must have regard to any views expressed by a party when deciding whether to hold a hearing. I consider both parties to be aware of the provisional view I took on 31 March. I consider that they have had ample time to express the view that there is a need for a hearing to determine whether there is an error of law in the judge's decision. No such view has been expressed.

16. The absence of any objection is relevant but it is not determinative. It remains for me to consider whether, in the exercise of my discretion, I should proceed without a hearing. Having considered the over-riding objective, and having reminded myself of what was said in Osborn v Parole Board [2014] 1 AC 1115, I consider it fair and just to proceed on the papers. The case involves no disputed oral evidence or the credibility of a party or a witness; the only question, at this stage, is whether the FtT erred in law in deciding the appeal as it did. I consider that I am able to determine that question fairly and justly on the basis of the documents before me.

Discussion

17. It is a signal feature of this case that, despite the basis of the appellant's claim, there has been very limited medical evidence adduced throughout. There appears to have been limited medical evidence adduced before Judge Aspden. There was limited medical evidence provided to the respondent in support of the most recent application, and only a small amount of additional medical evidence was adduced before the judge. It is surprising, in a case of this nature, that no expert evidence was adduced.

18. Instead, what the appellant relied upon before the FtT was various items of medical correspondence, between certain NHS practitioners. The appellant's bundle contained, at item 11,

'Some Medical Correspondence from 2009'. In fact, the correspondence labelled in that way dates from 11 November 2009 to 24 August 2015 and originates from practitioners tasked with the management of his differing health conditions.

19. More recent medical evidence appeared at items 3 and 4 of the bundle, labelled 'Medical Report of 06/04/18' and 'Latest Medical Report of 18/01/19'. Neither document is a medical report, properly so called.

20. The first of those documents is dated 6 April 2018 but it is incomplete in the appellant's bundle, just as it was in the respondent's bundle. It is not clear how much of it is missing. The name of the author is absent but it is addressed to the appellant's GP. The letter followed the appellant's 12 month review on 3 April 2018 and discusses the symptoms experienced by the appellant as a result of his panhypopituitarism, including varying energy levels, low libido and erectile dysfunction.

21. The second letter is complete. It is dated 18 January 2019 and followed a clinic of the same date. The author is an Endocrine Specialist Nurse at the same hospital in Liverpool. It states the appellant's diagnosis and medication regime before setting out two paragraphs describing his presentation at the Endocrine Nurse Led Clinic. It is said that he was 'not feeling at his best at this moment', with various reasons given for that statement. The latter half of that paragraph is as follows:

> "Michael reports that he is using his growth hormone pen regularly. He is rotating injection sites and his skin injection sites are healthy. He reports a poor libido. He does describe erectile dysfunction. He is unable to maintain erections and does not experience any early morning erections. Michael states that he is not attending the Liverpool Womens Hospital regarding fertility at this present time. He is not living with his partner at this present time although they are in contact. Michael states that he has not started on any more Testosterone replacement therapy as of yet. Michael tells me that he is compliant with all his medications. Pre-clinic bloods dated the 27th December are attached for your records."

22. The three sentences I have underlined represented, as I understand it, the first mention in any of the documents of the appellant having a partner and taking steps to conceive a child with her. There is no earlier reference to such a relationship, whether in the decision made by Judge Aspden in early 2016 or otherwise. It was not an aspect of the case which had been considered by the respondent in her decision. On any rational view, it introduced a potentially new dimension to the case, since

the fact (if accepted as such) that the appellant had continued a relationship and considered fathering a child was potentially relevant to the seriousness of his conditions, his need for personal care, and his dependence upon Mrs [O] for that care.

23. Notwithstanding its potential significance, it is clear from the judge's Record of Proceedings and from [31]-[38] of his decision that the Presenting Officer asked no questions about the appellant's partner. Having himself recognised the potential significance of the point, it was the judge who asked the appellant about it. At [38] of his decision, he wrote this:

> "When I asked the Appellant about the partner to whom the specialist nurse in Liverpool had referred in her letter to his GP in January 2019, he told me he had had a partner in London but no longer sees her."

24. The Presenting Officer seemingly asked no questions arising from that answer, nor did the representative seek to do so. No questions were asked of Mrs [O] about the appellant's relationship. The sum total of the evidence about this relationship was therefore the three sentences in the specialist nurse's letter and this single answer from the appellant.

25. With respect to the judge, this represented no proper evidential foundation for the findings he made at [55] and [56]. I have reproduced those findings above. The judge made similar points, with language of similar strength, at [47] and [53]. In the former paragraph, the judge stated that

> "the degree of independence which likely to have been required for him to conduct a serious relationship is difficult to reconcile with the accounts of the limitations on his day to day living provided by the Appellant and Mrs [O]"

26. The difficulty with all of these findings is that they were based on such limited information about the appellant's relationship. The judge did not know the identity of the woman in question or the way in which she and the appellant had met. Critically, the judge had received no evidence about how the relationship was carried on thereafter. If the appellant was able to leave his sister's house in Liverpool and make his own way to London to carry on a relationship, it is certainly difficult to see how he could have met the high threshold in regulation 8(3). If, on the other hand, the appellant's partner visited him entirely at his home, it is difficult to see how such a relationship could be thought to demonstrate a level of independence which served to undermine the appellant's claim that he was very unwell and very dependent upon Mrs [O].

27. To that extent, I accept that the grounds of appeal are made out and that the judge's decision was flawed by legal error. I say 'to that extent' because I am conscious that irrationality is alleged in the grounds and it is suggested, as I understand it, that the judge was wrong to take the relationship into account at all. It is even suggested at one point that it was discriminatory of the judge to suggest that a disabled person would be able to enter into a relationship. None of these charges are made out. As I have endeavoured to explain, the existence of the relationship was plainly relevant, and was plainly capable of having a bearing on the questions posed by regulation 8(3). It was not discriminatory for the judge to recognise the potential significance of the relationship and he would, to my mind, have been remiss if he had not alerted the parties to his concern. The error into which he fell was not as alleged in parts of the grounds, therefore; it was that he failed to establish a 'logical connection between the evidence and the ostensible reasons for the decision': Hayes v Willoughby [2013] 1 WLR 935, at [14], per Lord Sumption JSC. In other words, the judge made a finding of fact which was wholly unsupported by the evidence about the relationship: R (Iran) v SSHD [2005] EWCA Civ 982; [2005] Imm AR 535, at [12]. The limited evidence there was about the relationship could not rationally serve to undermine the appellant's claim to the extent thought by the judge.

28. It follows that the decision of the FtT will have to be set aside and the decision on the appeal must be remade de novo. None of the findings of fact made by the judge can stand. Given the extent of the fact finding which is necessary, I shall order that the appeal be remitted to the FtT.

29. The appellant would be well advised to ensure that there is evidence before the next judge dealing in detail with the matters I have set out at [26] above. Three decision makers have now commented on the fact that the letter of 6 April 2018 is incomplete and the appellant would be well advised to remedy that difficulty also. The respondent's next representative may legitimately choose to pursue the point which was unfortunately left to the judge to explore at the first hearing. She might also consider it advisable to file and serve a copy of the appellant's first EEA application, which was made in December 2016.

30. I make no specific directions to either party but the appellant will no doubt be advised that he bears the burden of proof and that inferences might properly be drawn in the absence of evidence.

Notice of Decision

The decision of the First-tier Tribunal was erroneous in law and is set aside. The appeal is remitted to the First-tier Tribunal for rehearing de novo by a judge other than Judge Anthony Higgins.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 July 2020