Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000998
First Tier Tribunal No: HU/02773/2021

THE IMMIGRATION ACTS

Decision & Reason Promulgated
On 12 March 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARTINS CHRIS NNABUIHE
[NO ANONYMITY ORDER]

Respondent

Representation:
For the appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the respondent: Mr D Krushner, of Counsel, instructed via Direct Access

Heard at Field House on 22 January 2023

DECISION AND REASONS

1. The appellant in the appeal before us is the Secretary of State for the Home Department and the respondent is Mr Nnabuihe. For ease of reference, we refer to the parties as they were before the First-tier Tribunal, where Mr Nnabuihe was the appellant and the Secretary of State the respondent.

Background

2. The appellant's appeal against the respondent's decision of 29 March 2021 to refuse the appellant's human rights claim was allowed by First-tier Tribunal Judge S Meah, on Article 3 grounds, in a decision promulgated on 11 January 2022.

3. The appellant first came to the UK from Nigeria in September 2008 on a medical visit visa and again entered the UK in September and October 2017 on a medical visit visa. The appellant did not leave the UK on expiry of his visa. The appellant suffers from advanced glaucoma. According to the medical evidence, including as set out in the letter of 16 July 2020 from Mr Brookes, Consultant Ophthalmic Surgeon, Moorfields Eye Hospital, this condition has caused the appellant to lose vision completely in the left eye with very poor vision in the right. His level of visual acuity was at that date 'count fingers' only in the right eye and 'no perception of light' in the left. The appellant claims that as a result of his blindness, he needs to remain in the UK to receive ongoing treatment and that there is no adequate treatment for his condition in Nigeria. He further claims that he has no one to turn to in Nigeria for any kind of assistance, and that he has no means to support himself there.

4. The respondent, as set out in her decision of 29 March 2021, did not accept that the appellant's removal from the UK would result in a breach of Article 3, the respondent asserting that there was no evidence that the appellant's case would fall within the extreme and exceptional category which would engage Article 3, ECHR. The appellant's conditions did not appear to be life threatening and it was not considered that his illness was of a type or severity that would found a claim to remain in the UK. The respondent noted that Nigeria has a health-care system which the respondent considered capable of assisting the appellant if necessary but that notwithstanding that, the respondent did not consider the appellant's illness to be of a type or severity that establishes a claim to remain in the UK.

First-tier Tribunal decision

5. Judge Meah noted that the appellant could not meet the requirement of the Immigration Rules in light of the respondent's refusal under suitability grounds as a result of a failure to pay NHS charges, the appellant relying on ECHR Articles 3 and 8 outside the Immigration Rules.

6. Judge Meah discussed, at paragraphs [30] to [32], the current test of Article 3 medical cases, as set out in the judgement of the Grand Chamber of the ECtHR in the case of Paposhvili v Belgium [2017] Imm AR 867 and considered by the Supreme Court in AM (Zimbabwe) [2020] UKSC 17. Judge Meah summarised the guidance including that whilst it was for the applicant to adduce evidence of their medical conditions, the returning state would be better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state.

7. Judge Meah, at paragraph [39] reminded himself that the relevant legal test was that:

> "substantial grounds have been shown for believing that the appellant, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in Nigeria or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his home country which would result in intense suffering or to a significant reduction in life expectancy, and the onus falls on the respondent to dispel any serious doubts that the appellant would suffer an Article 3 breach."

8. The judge carefully reviewed the evidence before him, before concluding at paragraph [40] that the medical evidence supported the appellant's claim under ECHR Article 3 including that:

> "all the letters from Consultant Mr John Brooks, as submitted to support the original application and including the most recent letter cited above, submitted specifically to support the appeal, alongside the opinion of the Lagos State Government, Isolo State Hospital, none of which have been challenged by the respondent, are sufficient to show, certainly to the standard I am required to apply here, that the appellant will not receive suitable and/or adequate treatment in Nigeria for his specific eye condition given the stage it is now at as explained by Mr Brooks in his most recent letter, to which I attach due weight, and owing to the lack of appropriate and specific treatment the appellant needs being available there, as indicated in the letter from the Lagos State Government Isolo State Hospital letter, and then in the emails from Dr Harriman, such that I find that his circumstances meets the test as set out in AM Zimbabwe. "

9. The judge went on to find at [41] that the culmination of factors:

> "the appellant not having access to any funds or an income in Nigeria, not having a home there or indeed any viable support networks available to him if were to be returned, would create a situation whereby given his blindness, he would be exposed to a serious, rapid and irreversible decline in his home country which would result in intense suffering or to a significant reduction in life expectancy. I therefore find that his appeal must be upheld."

The judge, at paragraph [42] found that the appellant's ECHR Article 8 claim stands with his decision under Article 3.

Permission to appeal

10. The respondent appeals with permission, granted by Upper Tribunal Judge Pickup, on three grounds. First, the respondent argues that the judge failed to apply the correct Article 3 threshold for medical cases, the respondent contending that whilst the appellant's visual impairments will remain, the judge's conclusions at paragraphs [40] and [41] applied a threshold falling well below that clarified by the Supreme Court in AM (Zimbabwe). Second, the respondent claims that the judge erred in finding that medical treatment would not be available in Nigeria, the respondent submitting that the judge had conflated the quality of care

that would be afforded to the appellant with availability. Finally, the respondent argued that the First-tier Tribunal erred in law in finding that the appellant would be destitute on return to Nigeria, in particular it was submitted that the judge ignored all available support that the appellant would have on return, including his remaining sibling, extended family, friends and charitable organisations.

Upper Tribunal hearing

11. It was on this basis the appeal came before us. Mr Whitwell relied upon the grounds of appeal. Although it was accepted that the judge had correctly quoted the law, it was the respondent's submission that he had not applied that self-direction. Mr Whitwell submitted, with reference to the respondent's bundle (RB) page 74, and a letter from John Brookes dated 18 March 2021, that although the appellant has a severe visual impairment, his current treatment is eye drops and further submitted that Dr Brookes' evidence is that surgery will be required at some stage in the future but that an assumption had been made that if no such treatment the appellant's condition will deteriorate, which Mr Whitwell argued was one step removed from the Paposhvili test. Mr Whitwell argued that the organic condition was the same in the UK or Nigeria and it was only if something happened in the future, that lack of available treatment might be an issue. Mr Whitwell accepted however that the grounds of appeal had not specifically argued that the judge had misapplied the second limb of the Paposhvili test, although he argued that the grounds referred to a material misdirection of law.

12. Mr Whitwell argued in respect of the second ground that the judge had given inadequate reasons or had failed to resolve a conflict in the evidence. The background evidence establishes that there are ophthalmologists available in Nigeria with three hospitals specialising in this field. However, Mr Whitwell argued that the judge did not consider 2 out of 3 of those hospitals, with the letter from St Edmund's Eye Hospital, at page 50 RB, silent in relation to treatment in Nigeria generally, stating only that the treatment wasn't available at that hospital. Paragraph [36] of the First-tier Tribunal decision sets out the letter of 19 November 2021 from the Lagos State Government, Isolo State Hospital, which states that the appellant's condition is better managed at Moorfields, which Mr Whitwell argued was not the test. Mr Whitwell further argued that Judge Meah did not deal adequately with the availability of treatment in Nigeria.

13. On the third ground Mr Whitwell argued that the judge did not resolve essentially inconsistent evidence. Page 5 of the appellant's evidence referred to the appellant, on 11 August 2020, having three siblings. In oral evidence the judge refers to evidence that two out of three of those siblings have passed. There was no finding as to why the judge favours the appellant's oral evidence. The written grounds note that the judge had not addressed the availability of the remaining sibling to provide support. In addition, it was argued that the judge had not fully addressed

the issue of why the appellant's extended family, friends and charitable organisations could not assist him on return.

Analysis

14. In our view none of the three grounds advanced were sufficient to demonstrate that the Frist-tier Tribunal made an error of law and we took into consideration Mr Krushner's rebuttal of the respondent's arguments.

15. Dr Brookes in his letter dated 16 July 2020 sets out that the appellant is severely visually impaired and that given glaucoma is a chronic progressive disease, it is likely to deteriorate further without adequate treatment, including that given the appellant developed glaucoma at a young age, this tends to be more serious with a poorer prognosis and often requiring multiple surgical interventions. The letter recommends that the appellant has a Baerveldt glaucoma tube implant and also to remove an anterior chamber intraocular lens implant. The letter is clear that if this surgery is not carried out it will result in complete blindness which is irreversible. Dr Brookes including in his letter dated 18 October 2018, indicates that given the appellant's end-stage glaucoma, he needs careful follow up to try and preserve the remaining vision in his right eye, Dr Brookes believing that there is significant risk that if he returns to Africa the management will be suboptimal and that the appellant risks losing his sight completely. Dr Brookes emphasises in all his correspondence the importance of adequate medical care, which he indicates is essential in trying to prevent any further deterioration. Dr Brookes further believes that the treatment that the appellant had received in Nigeria had been inadequate and had his condition been dealt with differently (in Nigeria) this may have improved his outcome. Dr Brookes in a letter dated 28 October 2020, which the judge set out at [34], indicated that due to the complex nature of the surgery that the appellant would require it was best carried out in the UK and that there was a very high risk of his vision deteriorating further if returned to Nigeria.

16. It was open to Judge Meah to find as he did that the totality of the medical evidence from the UK, together with the medical evidence from Nigeria, including the opinion of the Lagos State Government Isolo State Hospital, that the appellant's condition was better managed at Moorfields 'to prevent complications and also to ensure proper follow up' and the letters from Dr Harriman at St Edmunds Hospital that he does not to the glaucoma drainage devices (tube surgery), were sufficient to show to the required Article 3 standard that the appellant will not receive suitable and/or adequate treatment in Nigeria for his specific eye condition, given the stage of his condition.

17. Even if Mr Whitwell's belated argument that the judge had misapplied the second limb of the test had been properly before us, we are satisfied that the judge properly applied the test, including that he accepted the medical evidence that the appellant's treatment includes not just eye drops, but the careful management of his condition in the run up to his required surgery. All the medical evidence, which the judge accepted and which

the respondent had not challenged, underlined the importance of this medical ongoing management in an effort to preserve the appellant's remaining sight. This evidence was underlined by the (unchallenged) evidence before the First-tier Tribunal that the appellant had received previous sub-standard treatment for his eye condition in Nigeria.

18. It is in our judgment clear, that the First-tier Tribunal took into account and referred to the correct legal framework in its decision, including at paragraphs [30] and [31] and the judge made it clear that he applied the correct test. Ground 1 is not made out.

19. We have taken into account that Judge Meah, having considered all the evidence, including the medical evidence, in particular the evidence from Mr Brooks, was satisfied that a combination of factors led to his reasoned conclusion that the appeal should succeed. The judge carefully considered a range of factors, including what the judge accepted to be a lack of adequate treatment in Nigeria, as well as the circumstances that the appellant would face, the judge finding that the appellant would not have access to any funds or an income in Nigeria, would not have a home, nor would he have any viable support networks available. In these circumstances the judge made a finding that was open to him, that if returned, given the appellant's blindness, he would be exposed to a serious, rapid and irreversible decline, which would result in intense suffering or to a significant reduction in life expectancy.

20. Whilst the respondent might well have made arguments which could arguably have led to the judge reaching a different conclusion, the respondent did not appear before the First-tier Tribunal to make such arguments.

21. The judge made it clear he had considered the appellant's evidence, including in relation to the difficulties the appellant would face on return to Nigeria, the judge describing the appellant, at paragraph [48] as an impressive and credible witness 'who gave very cogent evidence which I believed' and noted that the appellant had supported his case with relevant and highly persuasive recent documentary evidence, in particular the medical letter from the appellant's consultant Mr Brookes from the Moorfield Eye Hospital and the letter from the Lagos State Government.

22. In terms of the respondent's argument that the judge erred in the consideration of availability of treatment in Nigeria, we reject the respondent's submission that the judge had conflated the quality of care with availability. Whilst it is argued that the appellant would not have a complete absences of treatment available to him in Nigeria, that was not the test to be applied. The judge properly considered, as he was required to do, both the appropriateness of the available treatment and the appellant's ability to access such treatment.

23. Whilst Mr Whitwell submitted that the judge was silent in relation to the availability of treatment in two out of three of the hospitals specialising in this area in Nigeria, the judge was entitled to reach the conclusion he did

on the availability of treatment, on the totality of the unchallenged evidence which the judge clearly set out and had considered in the round. This included evidence from the Lagos State Government, Isolo State Hospital and from Dr Harriman of St Edmunds' Eye Hospital in Nigeria. Such evidence was considered in the context of the appellant's previous surgery at Lagos University Teaching Hospital in Nigeria, which medical evidence indicates was not successful and which Dr Brookes (whose clinic has been treating the appellant, intermittently, since 2008) indicates was 'inadequate' and if dealt with more appropriately 'may have well improved his outcome'. Whilst we accept that Dr Brookes may not be in a position to comment more generally on the quality of treatment available in Nigeria, it was open to Mr Brookes to provide as he did, his expert opinion on the appellant's previous treatment in Nigeria. We find that no error of law is disclosed in Ground 2.

24. In relation to the criticism of the judge's finding that the appellant would face destitution on return to Nigeria, again we find this criticism to be misplaced. As we have indicated, the judge found the appellant to be an impressive and credible witness and it was open to him in that context to prefer the appellant's oral evidence that two of three of his siblings had passed away. Whilst the judge might not have explicitly addressed the third sibling or the availability of extended family, friends and charitable organisations to assist him, he addressed this evidence in terms, where he made his findings at paragraph [41] that the appellant would not have access to any funds or an income in Nigeria, nor any viable support networks. This also must be considered in the context of the judge's positive credibility findings and in the context of the appellant's evidence, including as set out at [26] in the material background, that he does not have friends in Nigeria due to the stigma of his eye disability in Nigerian society.

25. Judge Meah therefore considered the totality of the evidence before him, including the evidence of the conditions in Nigeria, the judge having set out, at paragraph [26], that material background relied on by the appellant in his initial representations to the respondent. It is clear from the subsequent discussion that the judge considered both the respondent's reasons for refusal letter and the evidence and submissions made on behalf of the appellant. We find that Ground 3 is not made out.

26. Having carefully considered all that evidence, the judge concluded that returning the appellant to Nigeria would breach Article 3, ECHR. We are satisfied that although the Secretary of State disagrees with that decision, the criticisms of that decisions articulated in the grounds of appeal and before us, were insufficient to amount to an error of law.

27. The findings and conclusions of Judge Meah are rooted in the evidence, the judge considering the evidence as a whole and giving adequate reasons for his decision. As the judge himself correctly self-directed at paragraphs [21] to [22], adequate reasons should identify and resolve key conflicts in the evidence and explain clearly the reasons to enable the losing party to

know why they have lost. It need not be a counsel of perfection. Judge Meah's findings are neither unreasonable nor irrational.

DECISION

28. The making of the previous decision did not involve the making of an error on a point of law.

The appeal is dismissed. The decision of Judge Meah shall stand.

Signed M M Hutchinson Date: 2 March 2023

Deputy Upper Tribunal Judge Hutchinson