IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002058
First-tier Tribunal No: HU/55846/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
6th September 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Oyedotun Obafemi Adegboye — Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department — Respondent

Representation:
For the Appellant: Mr L Youssefian, of Counsel, instructed by D J Webb & Co Solicitors.
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 2 August 2023

DECISION AND REASONS

1. The appellant, a national of Nigeria born on 20 May 1968, appeals against a decision of Judge of the First-tier Tribunal Manuell (hereafter the "judge") who, in a decision promulgated on 30 January 2023 following a hearing on 24 January 2023, dismissed his appeal on human rights grounds against a decision of the respondent of 22 September 2021 to refuse his application of 17 April 2020 for leave to remain on the basis of his human rights.

2. The appellant relied upon Article 3 of the ECHR in relation to his medical condition and Article 8 in relation to his private life. He has kidney damage brought about by Type II diabetes (diabetic nephropathy), which, if untreated or inappropriately treated, would cause his kidneys to fail. He would then need a transplant (para 6 of the judge's decision).

3. Mr Youssefian accepted before me that it was accepted before the judge that treatment for the appellant's medical condition was available in Nigeria and that the issue before the judge was whether the appellant would be able to afford such treatment and therefore whether he would be able to access such treatment.

4. The grounds contend, in summary, that the judge failed to make a finding whether the appellant would be able to afford the treatment that he requires (ground 1) and failed to take into account relevant background material on this issue (ground 2). In addition, there was a real possibility that the judge was biased (ground 3). This was

because he had said that the appellant "*has made no contribution to society*" and that he "*is a cheat*" (para 16 of the judge's decision).

5. The grounds contend that the appellant is a "*seriously ill*" person. This phrase is a reference to the threshold test explained in AM (Art 3; health cases) Zimbabwe [2022] UKUT 00131 (IAC). The head-note in AM (Zimbabwe) reads:

> "1. In Article 3 health cases two questions in relation to the initial threshold test emerge from the recent authorities of AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 and Savran v Denmark (application no. 57467/15):
>
> (1) Has the person (P) discharged the burden of establishing that he or she is "a seriously ill person"?
>
> (2) Has P adduced evidence "capable of demonstrating" that "substantial grounds have been shown for believing" that as "a seriously ill person", he or she "would face a real risk":
>
> [i] "on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,
> [ii] of being exposed
> [a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or
> [b] to a significant reduction in life expectancy"?
>
> 2. The first question is relatively straightforward issue and will generally require clear and cogent medical evidence from treating physicians in the UK.
>
> 3. The second question is multi-layered. In relation to (2)[ii][a] above, it is insufficient for P to merely establish that his or her condition will worsen upon removal or that there would be serious and detrimental effects. What is required is "intense suffering". The nature and extent of the evidence that is necessary will depend on the particular facts of the case. Generally speaking, whilst medical experts based in the UK may be able to assist in this assessment, many cases are likely to turn on the availability of and access to treatment in the receiving state. Such evidence is more likely to be found in reports by reputable organisations and/or clinicians and/or country experts with contemporary knowledge of or expertise in medical treatment and related country conditions in the receiving state. Clinicians directly involved in providing relevant treatment and services in the country of return and with knowledge of treatment options in the public and private sectors, are likely to be particularly helpful.
>
> 4. It is only after the threshold test has been met and thus Article 3 is applicable, that the returning state's obligations summarised at [130] of Savran become of relevance – see [135] of Savran."

The medical evidence and the background material regarding treatment in Nigeria

6. The medical evidence relied upon on the appellant's behalf at the hearing before the judge consisted of the following:

(i) A letter dated 3 July 2013 from Dr Ruvan Kottegoda (AB/4-6) addressed to Dr Rachel Bennett which states (AB/6):

> "Thank you for your referral of this patient to the Renal Diabetes Clinic. Unfortunately, he failed to attend. He has appallingly poor blood sugar control and has a raised albumin-creatinine ratio which suggests that the diabetes has affected his kidneys (diabetic nephropathy).
>
> I notice that in your referral you have made little progress in addressing his glycaemic control and that the patient does not seem to comprehend the potential seriousness of his condition.

> It is likely that in the coming years he will progress to further kidney damage and eventually kidney failure.
>
> In view of his non-attendance I have not offered a further appointment. If you wish for his care to continue at Lewisham Hospital please do not hesitate to re-refer him. It is vitally important that the patient takes an active part in managing his diabetes and should be encouraged to attend all hospital appointments be it with the doctor, nurse or dietician.
>
> I have taken the liberty of copying in the patient so he is aware that he does need to pay attention to his overall health and that he has a responsibility to do so.
>
> Follow Up: Discharged"

(ii) A medical report dated 10 July 2013 from Dr Rachel Bennett of the Diabetes Unit at Lewisham Healthcare NHS Trust which confirmed that the appellant suffered from both type II diabetes and diabetic nephropathy or kidney disease brought about by diabetes. This report listed the medication that the appellant was required to take as at the date of the report.

(iii) Letter dated 18 August 2021 from Mr Veeru Rajamuthiah, Practice Manager, at Honor Oak Group Practice (RB/31) which states that the appellant was diagnosed with diabetes on 5 December 2012 and that he attends the practice for regular check-ups.

(iv) The following prescription slips:

(a) Prescription slips dated 13 April 2021, 18 May 2021 and 13 Aug 2021 (RB/28, 29 & 20).

(b) Prescription slip dated 19 March 2019 (AB/7).

7. The background material relied upon before the judge concerning treatment for diabetes and diabetic nephropathy was as follows:

(i) An article entitled: "*Diabetic nephropathy – complications and treatment*" by Andy KH Lim published in International Journal of Nephrology and Renovascular Disease 2014:7 361-381 by Dove Medical Press Limited.

(ii) An Article entitled: "*Diabetes Care in Nigeria*" by Olufemi A. Fasanmade, MD, Samuell Dagogo-Jack, MD published (it appears) in "*Annals of Global Health*" Vol. 81, No. 6, 2015.

(iii) The respondent's "*Country Information Note Nigeria: Medical treatment and healthcare*", version 4.0 dated December 2021 ("CPIN"), paras 9.1.3, 16.1.7 and 16.1.8 of which stated as follows:

> 9.1.3 A Daily Trust, a Nigerian newspaper, article from 2019 noted:
>
> '[A patient] who has suffered from diabetes for over 20 years, said diabetes management is almost beyond the reach of many Nigerians.
>
> '"Apart from drugs, you need a healthy lifestyle - nutritious food (with less carbohydrate), physical activities, etc. Many people with diabetes also have other conditions such as hypertension which must also be adequately managed. For me, I have to buy insulin (N2,500) [£4.56[130]] twice a month in addition to oral drugs…"
>
> '…"It is very expensive to manage the disease as most of the medications are being imported. It is not affordable to an average Nigerian living with the condition. Affordability

and availability of the medications are major issues that need to be looked into by authorities in easing the suffering of people living with diabetes," [a professor] said.'[131]

16.1.7 A MedCOI response of November 2020 noted: '… the costs for inpatient treatment by a nephrologist is difficult to ascertain as it depends on each individual patient. Some may need longer admissions if there [sic] are unwell while some may not stay long if they improve quickly. For example, in Lagos state university teaching hospital, where kidney transplants are infrequent, the transplant cost is NGN 5million [around £8,900[203]] and covers the costs of surgery, post-transplant care and drugs post-transplant for up to 6 months.'[204]

16.1.8 Further, according to the November 2020 MedCOI response '… the overall cost per month concerning the treatments… for such a post-renal transplant patient is roughly NGN 400,000/month [£714[205]]. The NHIS does not support such treatments.' [206]

Footnotes:
130 XE Currency converter, 29 November 2021
131 Daily Trust, 'Nigeria: World Diabetes Day...', 14 November 2019
203 XE Currency converter, 11 October 2021
204 MedCOI, Response to information request, BDA 7369, 9 November 2020
205 XE Currency converter, 11 October 2021
206 MedCOI, Response to information request, BDA 7369, 9 November 2020

The judge's decision

8. The judge summarised the appellant's oral evidence in cross-examination, at paras 8-12. This included his evidence about the reason why he did not return to Nigeria after first arriving on a visit visa in 2007 at para 8, his work in Nigeria and in the United Kingdom and the prospects of obtaining employment in Nigeria at para 9. At paras 11-12, the judge summarised the evidence the appellant gave about his treatment. Paras 8-11 read:

> "8. Under cross examination, the Appellant said that he had never left the United Kingdom after his entry on a visit visa in September 2007. He could not explain why the Home Office thought he had obtained a second visit visa. He said he had not left the United Kingdom because he could not afford medicines in Nigeria. The Appellant claimed he had not known what was wrong with him in Nigeria. He was diagnosed in 2012-2013 in the United Kingdom. That was why he had stayed. He had come to work in the United Kingdom to feed his family in Nigeria.
>
> 9. The Appellant said that he had worked as an electrician in Nigeria but the work was not steady enough to support his family, his wife and children. They were still in Nigeria. In the United Kingdom the Appellant worked cash in hand, doing odd jobs and gardening. He could not work as an electrician as he was not qualified to work as an electrician in the United Kingdom. He would not be able to find constant work in Nigeria. There was more work available in the United Kingdom. He knew he had no right to work in the United Kingdom.
>
> 10. The Appellant said that his wife and children lived in his mother's house which had 8 rooms. He had married sisters living in Nigeria. The Appellant rented his accommodation in the United Kingdom. He looked after himself. In the past his church had helped him. That support would not continue if he went to Nigeria.
>
> 11. The Appellant produced the boxes for his prescribed medicines. He had check ups every three months, which included blood tests and eye check ups. He did not need a transplant at the moment. He had been sent to the dietician in 2022. He had been given an NHS exemption after he had collapsed. He had paid before that.
>
> 12. The Appellant agreed that treatment was available in Nigeria but it was expensive and he could not afford it. He would not find work sufficient to pay for it. Now he was older there would be no opportunity. He was in the United Kingdom by the grace of God. He would

pay for the NHS treatment if he were allowed to work. He sent money to his family when he could."

9. The judge considered the appellant's Article 3 claim at paras 15-20 and his Article 8 claim at paras 21-22. At 22, he mentioned the Article 3 threshold. Paras 15-22 read:

> "G. Findings and Decision
>
> 15. This appeal is based on facts sadly not unfamiliar in this tribunal, namely a person who has refused to accept that he has no legal basis to remain in the United Kingdom and who has refused to leave despite the clearest possible warnings that he must leave. The Appellant was an unimpressive witness and his evidence was thin. The tribunal finds that he is dishonest and that his evidence cannot be treated as reliable.
>
> 16. The Appellant has admitted that he came to the United Kingdom to work, which means that his visit visa or visas were fraudulently obtained. The Appellant has never had any right to work yet he admitted that he continues to do so. He pays no income tax and makes no contribution to society. He is a cheat.
>
> 17. The Appellant's moral character is irrelevant to his Article 3 ECHR claim. The Appellant's claim that he would face harm and a shortened life expectancy in Nigeria was not supported by the evidence. The Appellant was not diagnosed until after he became an overstayer in the United Kingdom, so he has no personal experience of the management of diabetes in Nigeria. The medical evidence he produced about himself was not up to date, but it indicates that his disease is being managed by standard medicines which are available (or in equivalent form) in Nigeria: see the CPIN for Nigeria 2022, 9.1.1 to 9.1.3. The difference is that the Appellant receives medicines free in the United Kingdom, whereas in Nigeria he would probably have to pay.
>
> 18. Diabetes Care in Nigeria (2015), from The Annals of Global Health, produced by the Appellant in support of his case states: "At the secondary care centers, there are medical officers and sometimes consultant (specialist) physicians with advanced knowledge and experience in managing diabetes and, hence, most patients are adequately treated". Elsewhere it is noted that diabetes is an increasingly common disease in Nigeria, partly because of urbanisation and changed life styles.
>
> 19. When the Appellant was diagnosed (see the referral letter dated 3 July 2013), it was said he failed to attend and was described as having "appalling blood sugar control". The Appellant was said to need to be aware of paying attention to his overall health. The tribunal was not referred to any more recent report, although his prescribed medicines were listed.
>
> 20. It may be that the Appellant will eventually need a kidney transplant, but there was no evidence to suggest that a kidney transplant is needed now. Such treatment is a last resort and carries many hazards. Such treatment is available in Nigeria, if not to United Kingdom standards and the cost of drugs such as insulin cannot be considered exorbitant. It was also noted that there is a shortage of black donors in the United Kingdom. That problem should be less acute in Nigeria where the majority of the population is black. It may even be that the Appellant has a compatible relative willing to donate a kidney, if that situation should eventually be reached.
>
> 21. Turning to the Appellant's Article 8 ECHR private life claim, he has his wife and children in Nigeria, as well as the family home. The tribunal finds he retains close links to Nigeria. The Appellant has not been away for such an extended period that he would be a stranger in his own land. The time gap between Nigeria and the United Kingdom is minimal if at all, so continued communication with friends in the United Kingdom would not be difficult. The Appellant will be able to continue the management of his diabetes in Nigeria. The tribunal finds that there would not be very significant obstacles to the continuation of private life in Nigeria.
>
> 22. In any event the Appellant's private life in the United Kingdom was developed while he had no leave to remain and hence attracts little weight (unless the Article 3 ECHR threshold had been reached). The Article 8 ECHR private life appeal cannot succeed."

10. The judge's decision on the appellant's Article 8 claim is not challenged in the grounds.

The grounds

11. The grounds contend, in summary, that the judge erred in law as follows:

(1) Ground 1: The judge failed to resolve whether the treatment required by the appellant would be affordable to him and therefore whether he could access such treatment.

(2) Ground 2 is as follows:

(a) The judge failed to take into account evidence in the CPIN.

(b) The judge did not give '*sufficient consideration'* to the appellant's medical evidence which (the grounds contend) shows that he is '*seriously ill*'".

(c) The judge failed to give adequate reasons for his finding that the cost of the necessary treatment was "*not exorbitant*".

(d) In the alternative, the judge's finding that the appellant would be able to access treatment that he will require in the future is perverse.

(3) Ground 3: The judge's findings at paras 15 and 16, that the appellant "*has made no contribution to society*" and that "*he is a cheat*" demonstrate a real possibility of bias.

Submissions

12. In relation to ground 1, Mr Youssefian submitted that it is clear, from para 17 onwards of his decision, that the judge considered the availability of treatment in Nigeria. However, the central argument before the judge, as the judge's summary of Counsel's submissions at para 14 demonstrates, was not that the treatment that the appellant requires was not available in Nigeria but that the available treatment, such as the drugs etc that he is currently taking to manage his condition, were unaffordable for him. This was how the appellant's case under Article 3 was put to the judge. The judge did not resolve this issue. At para 17, the judge said that the appellant received medicines for free in UK whereas in Nigeria he would probably have to pay. This comment does not resolve the affordability issue.

13. Although para 20 faintly refers to affordability, in Mr Youssefian's submission, this was only in relation to potential future kidney transplant. However, such treatment is a last resort and carries many hazards. At para 20 of his decision, the judge was only addressing kidney transplant. In that context, the judge stated that the cost of insulin cannot be considered exorbitant. In Mr Youssefian's submission, this was the total assessment by the judge of the appellant's essential case, that available treatment is not affordable to appellant.

14. The judge therefore materially erred in law, given that it is clear from AM (Zimbabwe) that lack of access to such treatment is important.

15. I asked Mr Youssefian whether there was evidence that the appellant was a seriously ill person, in relation to the threshold issue identified in AM (Zimbabwe). Mr Youssefian submitted that the judge proceeded on the basis of an acceptance that

the appellant was a seriously ill person. Mr Youssefian based this submission on the fact that, although the judge did not state expressly that he found that the appellant was a seriously ill person, he had recorded Mr Youssefian's submission in that regard at para 14 of his decision and he did not proceed to find or state that the appellant was not a seriously ill person. By clear inference, therefore, the judge must have been satisfied that the threshold was satisfied given that he proceeded to consider availability of treatment, in Mr Youssefian's submission.

16. I drew Mr Youssefian's attention to the fact that the medical evidence that was before the judge was 10 years old. Mr Youssefian submitted that diabetes Type II is a condition that is always there. The appellant is a person with quite serious medical conditions.

17. In the alternative, even if the judge failed to address the threshold issue of whether the appellant was a seriously ill person, he materially erred in law.

18. In relation to ground 2, Mr Youssefian submitted that the judge failed to take into account relevant evidence, namely, the CPIN, on the question of affordability of treatment. In his submission, this was the most compelling error in the judge's decision. The fact that the judge failed to consider or even mention section 9.1.3 of the CPIN in relation to affordability underscores the error in ground 1. It is clear from para 9.1.3 of the CPIN that treatment for diabetes is not affordable to the average Nigerian. This means, in Mr Youssefian's submission, that management of diabetes is simply not affordable to the average Nigerian. This objective evidence was included in the respondent's own CPIN. It goes to the heart of the appellant's case that the treatment he requires is not affordable and therefore not accessible.

19. The judge made no reference to para 9.1.3 of the CPIN, let alone take it into account and engage with the evidence. There is no discernible consideration of what, if anything, differentiates the appellant from the average Nigerian. Mr Youssefian submitted that the background material before the judge all pointed to diabetes management being unaffordable in Nigeria. This was material that the judge failed to take into account or engage with or consider.

20. The judge's observation, at para 20, that the cost of insulin is not exorbitant, only concerned insulin. Furthermore, to say that the cost of insulin is not exorbitant is not the same as saying that it is affordable. Affordability is a fact-sensitive question.

21. Even if the judge had considered affordability, he failed to address why it would be affordable to this appellant when it is not affordable and accessible to the average Nigerian living in Nigeria with diabetes.

22. In relation to ground 3, Mr Youssefian reminded me that the question was whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased. He confirmed that actual bias was not being suggested. The judge's comment at the beginning of his assessment, at paras 15 and 16 set the entire tone of the findings that were made subsequently. The language used why the judge at paras 15-16 was intemperate and strident, in his submission. He made generalised comments about people refusing to leave the United Kingdom. He then said that the appellant was dishonest and a cheat and then proceeded to make findings in relation to Articles 3 and 8.

23. Mr Youssefian submitted that the judge did not make the findings at paras 15-16 in relation to proportionality so as to take those matters into account in relation to the public interest.

24. Mr Youssefian submitted that a fair-minded observer could come to conclusion that the judge was sick of people like the appellant who just refused to leave the United Kingdom such that the appellant was not given a fair hearing where the facts of his case would be considered on a holistic, even handed and impartial way. Although the judge said at para 17 that the appellant's moral character was irrelevant to Article 3, this begged the question why the judge said what he said at para 16 if it was irrelevant to Article 3.

25. In response on ground 1, Mr Wain submitted that the judge's finding at para 20 that the cost of insulin was not exorbitant was a direct reference to para 9.1.3 of the CPIN in which one individual had stated that insulin costs £4.56 which he needs the pay twice a month. Mr Wain submitted that this was the only evidence as to cost that was before the judge.

26. The burden of proof to establish his case under Article 3 on the basis of his medical condition was upon the appellant. At para 19 of his decision, the judge referred to the diagnosis referral letter of 10 July 2023. Aside from this letter, all that the judge had was a medication list, from 2019, at AB/7. The judge found that the medication was available in Nigeria. The only evidence that was before the judge and that specifically referred to cost, with regard to the appellant's treatment needs, was para 9.1.3. In Mr Wain's submission, given such limited evidence, the judge did resolve the conflict.

27. The judge did not make an express reference to whether he accepted that the appellant was seriously ill. However, in Mr Wain’s submission, this failure was not material because the judge went on to consider the appellant's treatment needs and medication and whether it is available and accessible. The fact that there was no explicit finding that the appellant is a seriously person is immaterial because the judge had gone on to consider availability and accessibility.

28. In relation to ground 2, the judge said at para 20, that there was no evidence to suggest that the appellant needed a kidney transplant at the present time. The judge was therefore hypothesising at para 20, that the appellant may need a kidney transplant at some point. However, there was no medical evidence to support that.

29. Mr Wain submitted that the grounds challenged the judge's assessment of the evidence before him but the reality is that that evidence was limited. On the evidence that the judge had, he made a finding on the affordability of insulin. He gave adequate reasons for saying that this appellant's treatment needs would be accessible.

30. In relation to ground 3, the question was whether the judge's comments indicate that he had a closed mind or had pre-determined the appellant's appeal. The judge said that the appellant was an unimpressive witness and that the evidence was thin. The judge's findings, that the appellant was dishonest, that he had worked whilst having no right to do so, and that he had paid no income tax and made no contribution to society were all findings that were open to judge based on the evidence that was before him and the appellant’s immigration history.

31. In Mr Wain's submission, the judge recognised that these comments and findings were not relevant to Article 3. However, in Mr Wain's submission, the findings were relevant to proportionality under Article 8, the factors in s. 117B of the Nationality, Immigration and Asylum Act 2002 and the maintenance of immigration control. The judge dealt with proportionality at para 21.

32. Mr Wain submitted that it could not be said that the judge had pre-determined the outcome of the appeal or deprived the appellant of a fair hearing.

33. In response, Mr Youssefian submitted that it was incorrect to state that para 9.1.3 of the CPIN constituted the only evidence before the judge of the cost of treatment. This is because the appellant had stated at para 5 of his witness statement that there would be no hope of receiving the treatment that he needs and certainly not a transplant in Nigeria and that he could not afford to access even his current treatment regime in Nigeria. In oral evidence before the judge, he said that he did not leave the United Kingdom after he first entered in 2007 because he could not afford medicines in Nigeria (para 8 of the judge's decision) and that treatment was available in Nigeria but it was expensive and he could not afford it; that he would not find work sufficient to pay for it; and that now that he was older, there would be no opportunity to work.

34. Mr Youssefian submitted that it was insufficient for the judge to say that the cost of insulin was not exorbitant. This was not enough to address the fact-sensitive question of affordability. The question is whether he was saying that it was not exorbitant according to a judge's standard or that it was not exorbitant for an average Nigerian to pay. The evidence in the CPIN is that the treatment is expensive. It would have been different if the judge had said that the appellant was not an average Nigerian or that he could work but the judge did not do so. The judge was completely silent on the central issue of affordability.

35. I reserved my decision.

ASSESSMENT

Ground 3

36. If ground 3 is established, this means that the appellant has not had a fair hearing. It would follow that the judge's decision would have to be set aside and the appeal remitted for a fresh hearing, irrespective of grounds 1 and 2. I therefore begin with ground 3.

37. The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased: Porter v Magill [2011] UKHL 67. Mr Youssefian confirmed that actual bias was not being suggested.

38. It is clear, in my view, that the judge was considering credibility at paras 15-16. The judge made it clear in the next paragraph, that the appellant's "*moral character*" was irrelevant to the appellant's Article 3 claim. Mr Youssefian questioned why, in that case, the judge had made the comments he made at paras 15 and 16. I agree with Mr Wain that the answer is that credibility was relevant to an assessment of proportionality, an issue which the judge considered subsequently, at para 21. Many judges begin their assessment of a case by considering credibility first. That is simply what the judge did in this case.

39. The judge's description of the appellant as a "*cheat*" was inappropriate and intemperate. However, on the evidence before him, he was entitled to say that the appellant had made no contribution to society, in my view, because there was no evidence that the appellant had made any contribution to society in terms, for example, of voluntary work or other such activities.

40. The appellant did overstay in the United Kingdom after entering on a visit visa in September/October 2007/2008 (the exact month and year are unclear), although I accept that the judge's comments about his immigration history at para 15 were strident.

41. It is necessary to consider the whole of the judge's decision, not merely the words "*cheat*", "*makes no contribution to society*" and the judge's comments at para 15 about the appellant's immigration history. There is no indication whatsoever at paras 17 onwards that the judge was straining to find reasons for dismissing the appeal. It is very clear that he considered the issues that he considered at para 17 onwards with an open mind, for the reasons I give below in relation to grounds 1 and 2.

42. Stepping back and considering the judge's decision as a whole, in particular his reasoning from paras 15-22, I do not accept that the test on Porter v Magill is satisfied. In my judgement, it cannot be said that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased:

43. Ground 3 is therefore not established.

'Seriously ill person'

44. I consider first Mr Youssefian's submission that, in relation to the threshold issue identified in AM (Zimbabwe), the judge had proceeded on the basis of an acceptance of Mr Youssefian's submission before him, to which the judge referred at para 14, that the appellant was a seriously ill person notwithstanding that the judge did not state expressly that he found that the appellant was a seriously ill person.

45. I simply do not accept that it is a clear inference that the judge had accepted that the appellant was a seriously ill person. There is nothing in his assessment at para 17 onwards that suggests that he considered that the appellant's condition was such that he was a seriously ill person. To the contrary, the words in parenthesis at para 22 show that he considered that the Article 3 threshold was not reached.

46. Furthermore, the mere fact that a judge does not engage with a submission does not mean that it should be inferred that the submission was accepted by the judge in question. It could equally mean that the judge simply overlooked considering the issue.

47. In addition, there was a dearth of up-to-date medical evidence before the judge. The medical evidence that the judge had was over 10 years old. When I drew Mr Youssefian's attention to the fact that the medical evidence that was before the judge was 10 years old, Mr Youssefian submitted that Type II diabetes is a condition that is always there and that the appellant was a person with quite serious medical conditions.

48. In other words, the clear inference was that Mr Youssefian was submitting that the appellant should be accepted as a seriously ill person notwithstanding the fact that

the medical reports/letters were over 10 years old simply because he has Type II diabetes. This submission ignores the contents of the letter dated 3 July 2013 from Dr Kottegoda, which I have quoted at para 6 above. It is very clear that the appellant's doctor had made little progress *then* in addressing the appellant's glycaemic control. It is clear from the letter that the appellant was not controlling his diet appropriately. The letter mentions the "*potential seriousness*" of the appellant's condition and that it is "*likely that in the coming years he will progress to further kidney damage and eventually kidney failure*" if the lack of diet control continued. There was simply no evidence before the judge whether the situation in 2013, of the appellant not exercising appropriate control over his diet, continued.

49. In addition, the appellant said in oral evidence that he was sent to the dietician in 2022. There was no evidence before the judge concerning the appellant's diet control between the date of Dr. Kottegoda's letter and the referral to the dietician in 2022. It cannot simply be assumed or inferred that it remained as indicated in Dr. Kottegoda's letter. Nor was there any evidence of the appellant's diet control after the referral to the dietician 2022.

50. More importantly, there was no evidence before the judge concerning the state of the appellant's kidney disease as at the date of the hearing before the judge. I have set out at para 6(i)-(iv) the medical evidence that was before the judge. No doubt, if the appellant's condition had worsened subsequent to the letter dated 3 July 2013 from Dr Kottegoda, such evidence would have been submitted.

51. In the absence of an up-to-date medical report that explained the appellant's current condition, there was simply no basis for any finding that the appellant was a seriously ill person, for the purpose of applying the guidance in AM (Zimbabwe).

52. For all of the reasons given above, I reject Mr Youssefian's submission that it is a clear inference that the judge accepted his submission that the appellant was a seriously ill person.

53. For the same reasons, if the judge had considered the issue, he would have been bound to find, on any legitimate view, that the appellant had not discharged the burden of proof upon him to show that he was a seriously ill person.

54. I have therefore concluded, even if it is the case that the judge failed to consider whether the appellant was a seriously ill person, the error was not material, given that the only medical report that was before the judge was over 10 years; that it is clear from the letter from Dr Kottegoda that the appellant's condition then was not such that he was at that time a seriously ill person; and that the appellant had said in oral evidence that he was sent to the dietician in 2022.

55. Not only was there no up-to-date medical report to describe the appellant's current medical condition, there was no medical report or evidence of any type that explained the impact on the appellant's health if he did not obtain the medicines he needed or the treatment he required. This is important in view of the fact that, as the Tribunal explained in AM (Zimbabwe), it was not sufficient for the appellant to merely establish that his condition will worsen upon removal or that there would be serious and detrimental effects. He was required to establish "*intense suffering*" or a significant reduction in life expectancy. There was simply no evidence before the judge that could have assisted on an assessment of whether, if the appellant was unable to obtain the medication and treatment that he required, he would be at real risk of

being in exposed to a serious, rapid and irreversible decline of his state of health resulting in intense suffering or to a significant reduction in life expectancy.

56. It appears to have been assumed, by the appellant and those advising him, that the evidence submitted to the judge would be sufficient to show that his current condition is such that he satisfies the threshold test for an Article 3 claim based on medical condition. That is simply not the case.

57. The mere fact that the appellant has been confirmed to suffer from Type II diabetes and the mere fact that he is taking the medication evidenced by his prescription slips are not sufficient to meet the threshold test. The appellant's own subjective evidence is not sufficient to meet the threshold test, although I have noted that he said at paras 6 and 10 of his witness statement:

> "6. The consequence of my not receiving treatment is that even if not immediately, very quickly, my health will start to deteriorate, and without access to urgent treatment I will probably die.
>
> 10. … The likelihood is that it could be just a matter of weeks before there was irreversible damage to my health. I would end up dying alone".

58. Although I accept that diabetes is not a condition that can be cured, it is nevertheless the case that sufferers can be at variant stages of the disease. Even where there is already some kidney damage, there needs to be evidence to show the stage at which the kidney damage has reached so that an assessment can be made as to whether inability to access treatment may lead to a serious, rapid and irreversible decline in the individual's state of health resulting in intense suffering or a significant reduction in life expectancy or whether, on the other hand, any such deterioration will only occur at some remote point in the future because (for example) the individual's disease is not at an advanced stage.

59. Given that there was no up-to-date medical report which specifically explained the appellant's current condition, his current medication and treatment and the impact on his condition that lack of appropriate treatment and/or medication would have, it is inevitable, in my judgment, that the judge was bound to dismiss the appeal on any legitimate view, even if he had not made any errors in his assessment, although I stress that I do not accept that the judge did materially err in law in his assessment.

60. Even if the judge erred in law as contended in grounds 1 and 2 (which I do not accept), the errors are not material, for the reasons given above. On this basis alone, this appeal stands to be dismissed.

61. However, I shall proceed to deal with grounds 1 and 2, as lodged.

Ground 1

62. Ground 1 is that the judge failed to resolve whether the treatment required by the appellant would be affordable to him and therefore whether he could access such treatment.

63. Mr Youssefian referred me to para 5 of the appellant's witness statement where he said:

> "5. … I will be in Nigeria where there would be no hope of receiving the treatment I need and certainly not a transplant. I cannot afford to access even my current treatment regime in

> Nigeria – the Tribunal will note that in relation to diabetes treatment, the Nigerian health care system is seriously lacking".

64. Mr Youssefian also referred me to the appellant's oral evidence set out by the judge at paras 8 and 12 of his decision. The appellant said in oral evidence that he had not left the United Kingdom because he could not afford medicines in Nigeria; that treatment was expensive in Nigeria and he could not afford it; that he would not find work sufficient to pay for it; and that now that he was older, there would be no opportunity to find work.

65. However, the appellant arrived in the United Kingdom in 2007, more than 15 years ago. It is also clear from paras 15 and 16 of the judge's decision that he did not find the appellant credible.

66. In any event, ground 1, that the judge failed to resolve whether the appellant could afford medical treatment in Nigeria, ignores the fact that the only background evidence as to cost that was before the judge was the evidence at para 9.1.3 of the CPIN which I have set out at para 7 above. Mr Youssefian submitted that the judge failed to explain what differentiates the appellant from the average Nigerian, given that the evidence shows that the cost of treatment for diabetes is not affordable to the average Nigerian. However, the judge was not obliged to consider the issue of affordability beyond the only specific evidence in the background material as to cost that was before him, i.e. the cost of insulin. In my view, given that the evidence was that insulin costs the equivalent of £4.26 for an unspecified supply (para 9.1.3 of the CPIN quoted above does not state how much insulin can be ought for this sum of money) and given that there was no medical report that explained precisely how much insulin the appellant takes per day, he was entitled to take the view that the cost was not exorbitant.

67. As the background evidence as to the cost of insulin, specified at para 9.1.3 of the CPIN was the only evidence as to cost of treatment before the judge, the judge adequately resolved the issue of affordability on the evidence that was before him.

68. Ground 1 is therefore not established.

Ground 2

69. Contrary to ground 2(a), the judge did consider the CPIN. He specifically referred to the CPIN at para 17 of his decision. I do not accept Mr Youssefian's submission that the judge did not even mention para 9.1.3 of the CPIN in his decision. He did mention this paragraph specifically – see the penultimate sentence of para 17 of his decision. This is the paragraph relied upon at para 1 of ground 2. At para 20, the judge dealt with the cost of insulin and said that it was not exorbitant.

70. There is simply no reason to think that, in saying that the cost of insulin is not exorbitant, the judge may have meant that it was not exorbitant from the perspective of a judge as opposed to the appellant. It is abundantly clear that he was considering the appellant's case and there is no reason to think that, at this particular point in his decision, he had in mind the notional circumstances of a judge or other person or persons.

71. Although the judge did not mention paras 16.1.7 and 16.1.8 of the CPIN which is relied upon at para 2 of ground 2, judges are not obliged to demonstrate that they have considered each and every aspect of the evidence relied upon.

72. As is acknowledged at para 4 of ground 2, the judge specifically mentioned Dr Kottegoda's letter at para 19 of his decision. The mere fact that the judge did not mention Dr. Bennett's letter does not mean that he did not consider it.

73. I therefore do not accept the submission at para 5 of ground 2 that the judge failed to take into account the CPIN and the letters from Dr Kottegoda and Dr Bennett. The submission that the judge failed to give the medical evidence sufficient consideration amounts to no more than an attempt to re-argue the case.

74. On the very limited evidence that was before the judge and given that the letters from Dr Kottegoda and Dr Bennett were over 10 years old, it simply cannot be said that the judge's decision that the appellant had not established his Article 3 claim was perverse.

75. Ground 2 is therefore not established.

76. However, I stress that, given the very limited and long-distant medical evidence that was before the judge, this appeal was bound to fail irrespective of grounds 1 and 2, for the reasons given at paras 44-60 above.

77. This appeal to the Upper Tribunal is therefore dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

The appellant's appeal to the Upper Tribunal is therefore dismissed.

Signed
Upper Tribunal Judge Gill Date: 1 September 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email.**