



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/44399/2013

THE IMMIGRATION ACTS

Heard at Field House

On 16 April 2015

Determination

Promulgated

On 30 April 2015

Before

**LORD BANNATYNE
UPPER TRIBUNAL JUDGE MARTIN**

Between

**KABIR ABIODUN MAKINDE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mansoor Malik

For the Respondent: Mr Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. In this case the appellant appealed against the decision of the First-tier Tribunal dated 30 July 2014 in which that Tribunal refused the appellant's appeal under Article 8 ECHR.

Background

2. The appellant is a national of Nigeria and appealed to the First-tier Tribunal against the decision of the respondent dated 10 October 2013 to

refuse his application to vary his leave to remain and to remove him from the UK under Section 47 of the Immigration and Nationality Act 2006.

3. This is what is commonly described as a “health case”.
4. The critical findings regarding the appellant’s health made by the First-tier Tribunal were these:

“16. The medical evidence makes it clear that the Appellant suffers from a life-threatening illness. He is dependent on thrice weekly dialysis, without which his prognosis is that he would die unless he were able to obtain a transplant. Access to treatment in Nigeria is clearly problematic for him and I am satisfied that his removal to Nigeria would place his life in jeopardy if he were unable to access suitable treatment. I am therefore satisfied that this case raises ‘compelling circumstances’ that would warrant consideration of the matter under Article 8 outside the ambit of the Immigration Rules”.

Thereafter at paragraph 23 the First-tier Tribunal found as follows:

“23. However, taking this evidence as a whole, I am satisfied that the Appellant was aware that he had kidney disease when he entered the UK”.

5. At paragraph 18 the First-tier Tribunal finds that:

“No issue has been raised with regard to ‘family life’ and the basis of the Appellant’s Article 8 claim is therefore his private life”.

At paragraphs 19 and 20 the First-tier Tribunal set out, against the foregoing background its approach to the issue of proportionality.

6. The First-tier Tribunal then proceeded to the proportionality assessment and at paragraph 26 held this:

“I must now proceed to a balancing exercise, taking into account the judicial dicta discussed above. This is a very compassionate case and one cannot but have great sympathy for the Appellant. However, I have found it likely that he came to the UK with the main purpose of getting publicly-funded medical treatment for a life-threatening condition. This is, I regret, not a case where there are factors in the Appellant’s favour that outweigh the Respondent’s legitimate aim and I have to conclude that the Respondent’s decision does not violate his Article 8 rights”.

7. Finally at paragraph 27 in its concluding comments the First-tier Tribunal says this:

“I would add only that, given the highly compassionate circumstances, I would expect the Respondent to deal with any removal arrangements with great sensitivity and to organise these in such a way and at such a time as to minimise the risks to the Appellant’s health and, if appropriate, to delay

removal until he has been able to make suitable arrangements for future care and treatment in Nigeria”.

8. The appellant obtained permission to appeal on a very narrow basis. The ground on which permission to appeal was granted related solely to the First-tier Tribunal’s observations made at paragraph 27 as quoted above. It is perhaps convenient to quote the material part of the permission to appeal at this stage:

“While it may be that this last paragraph was not intended to have more than persuasive effect, it is at least arguable that the judge there was stating his view that it would not be proportionate to return this appellant until at the very least the respondent had done her best to ensure that satisfactory arrangements were in place regarding the continuity of the appellant’s care on return. If that is so then it is arguable that in the absence of any assurance from the respondent as to what steps she intended to take (if any), “to minimise the risk to the appellant’s health and if appropriate, to delay removal until he has been able to make suitable arrangements for future care and treatment in Nigeria”, his finding that it would be proportionate to return the appellant is inconsistent with this expectation that he would not be returned without such arrangements having been made”.

Submissions on behalf of the Appellant

9. Mr Malik’s submissions were in very short compass and in summary repeated what we have above set out from the permission to appeal. It was his position that until suitable arrangements for the appellant’s future care and treatment in Nigeria had been made it would not be proportionate to remove him. The First-tier Tribunal, given its expressed view in paragraph 27, in the absence of evidence as to suitable arrangements having been made, could not hold his removal proportionate and thus it had erred in law. In addition it was his position that given the view expressed by the First-tier Tribunal in paragraph 27 this should have formed part of its considerations in assessing proportionality and accordingly given that the First-tier Tribunal had dismissed the appeal it had not had regard to this material factor and this amounted to an error in law.

Reply on behalf of the Secretary of State

10. At the outset Mr Bramble drew our attention to this: the Upper Tribunal Judge who had granted permission to appeal had not dealt with the issue of the appeal being allowed out of time. We have treated the grant of permission as being conditional and in the interests of justice given the particular circumstances of this case we allowed the appeal to proceed.
11. With respect to the substantive issues in the appeal his position was this: the approach of the First-tier Tribunal was correct. It had made clear and detailed findings, it had considered and applied the relevant law and carried out a proper proportionality exercise.

12. With respect to what was said within paragraph 27 of the First-tier Tribunal's determination this was no more than a remark made by it after it had carried out the proportionality exercise. Moreover the Upper Tribunal Judge who had granted the permission had misunderstood what was said at paragraph 27 as he appeared to think it was for the respondent to do her best to ensure that satisfactory arrangements were in place and that was not what was said.

Discussion

13. We believe that there is considerable force in the submissions made on behalf of the respondent.
14. It appears to us that the arrangements for the appellant's return are not a relevant issue in the proportionality assessment. The consequences to the appellant of his return, which are held by the First-tier Tribunal to be life threatening (see: paragraph 16) have been properly taken into account in that assessment. They have been weighed against the public interest factors and looked at in the context of the appellant being aware of his condition when he entered this country. This is a proper assessment of proportionality. In these circumstances we are satisfied that the First-tier Tribunal was correct to hold that the appellant should be removed. Thereafter, the removal arrangements are a separate matter, which form no relevant part of the proportionality exercise. How and when the appellant is removed, the First-tier Tribunal having assessed proportionality, is a matter for the respondent and outwith the jurisdiction of the First-tier Tribunal.
15. Moreover, we agree with Mr Bramble, the Upper Tribunal Judge who granted permission, appears to have misunderstood what was said by the First-tier Tribunal at paragraph 27. He seems to have understood that the First-tier Tribunal was saying that it was for the respondent to do "her best to ensure that satisfactory arrangements were in place regarding the continuity of the appellant's care on return". On a proper understanding of paragraph 27 that is not what the First-tier Tribunal said. What it did say was this:

"... to delay removal until he (our emphasis) has been able to make suitable arrangements for future care and treatment in Nigeria".

The "he" referred to in the said passage is the respondent not the appellant.

16. Further, what is said within paragraph 27 in our view on a proper construction is no more than an observation, which is being made after the decision on the issue of proportionality has been made and has no legal effect. The paragraph commences in this way:

"I would add only that, given the highly compassionate circumstances, I would expect ...".

Such wording on a proper reading amounts to this: the First-tier Tribunal is, after making its decision on the substantive issue before it, setting out its hope that certain steps regarding removal will be carried out with sensitivity and organised in a particular way. The First-tier Tribunal is saying no more than that. The First-tier Tribunal had no power to order the respondent to do anything in relation to how the removal is carried out. It was rather, in what are clearly compassionate circumstances, making a statement of hope which could have no more than persuasive effect. This statement had no legal effect and on a proper reading of the whole determination it was clearly not intended by the First-tier Tribunal to have had any such effect. We are satisfied that the construction sought to be placed upon this paragraph by the judge who granted permission in this case and by the appellant it is not capable of bearing.

17. Overall, we believe that this is a well constructed determination in which all relevant caselaw and evidence has been taken into account and in which the approach to the proportionality assessment is unimpeachable having regard to the authorities in this area.
18. For the above reasons we dismiss the appeal.
19. We make no anonymity direction.

Signed

Date

Lord Bannantyne
Sitting as a Judge of the Upper Tribunal