Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22287/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 22 October 2019	**On 13 November 2019**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

IGHAYERE CHRISTIAN EBOSELE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Malik of Coventry Law Centre
For the Respondent: Ms H Aboni, Senior Presenting Officer

DECISION AND REASONS
(Decision given orally on 22 October 2019)

Introduction

1. This is an appeal by Mr Ebosele, a national of Nigeria, born on 26 September 1978. He appeals against a decision of the First-tier Tribunal promulgated on 14 March 2019 dismissing his appeal against the decision

of the Secretary of State of 10 October 2018 refusing to grant him leave on human rights grounds.

Factual Background

2. To put the case in its proper context, the appellant arrived in the United Kingdom lawfully as a visitor in June 2009, with leave granted until 6 December 2009. Thereafter, the appellant overstayed and remained unlawfully in the United Kingdom. On 20 October 2012, the appellant applied for an EEA residence card, but such application was refused on 3 March 2013. The appellant was served with a notice of removal on 30 September 2013 informing him of his immigration status and liability to removal. The appellant, nevertheless, remained in the UK.

3. On 17 May 2018, the appellant made an application for leave to remain on human rights grounds, which was refused in the decision 10 October 2018. This application was ostensibly founded on the appellant's serious medical condition (see page C1 of the Respondent's bundle) and in particular his need for dialysis three times per week as a consequence of kidney failure. It was observed in the application that this was not a medical condition that the appellant had prior to his arrival in the UK and it was asserted, *inter alia*, that the appellant would not be able to obtain employment, accommodation or medical treatment in Nigeria, nor would he be able *"to maintain a careful diet and fluid restriction."*

4. The medical evidence identifies that there would be serious consequences for the appellant should he not receive dialysis, with the clearest evidence being in the form of a letter dated 16 April 2018 (page F1) authored by Dr Ayub, an associate specialist in Nephrology. Dr Ayub states that the appellant receives dialysis on alternate days with a two day gap over the weekend, his health will deteriorate very rapidly if he is not dialysed *"and he will not be able to survive for more than a week or two".* He could travel to Nigeria and then 16 hours to his hometown but only *"if it is done in such a way that he gets his dialysis before and immediately when arriving in Nigeria…he can be left without dialysis for 48 hours."*

5. The Secretary of State rejected the appellant's application ostensibly on the basis that his private life in the United Kingdom, absent the medical treatment, was relatively insignificant, that appropriate medical treatment could be obtained in Nigeria and, as a consequence, the very high threshold for demonstrating a breach of Article 3 in medical cases had not been met.

Decision and Discussion

6. The grounds of challenge fall into two limbs. The first limb of the grounds asserts procedural unfairness in the First-tier Tribunal's proceedings, and the second limb asserts unlawful consideration of the consequences for the appellant of his illness and need for medical treatment.

7. Turning then to the first limb of the grounds, which is founded on the appellant's statement that he was first provided with a copy of the Home Office bundle on the day of the hearing, which left him confused and unable to properly pursue his case. It is asserted, as a consequence, that the First-tier Tribunal erred in failing to adjourn the hearing so as to allow the appellant to properly consider the documentation in the bundle. Within this limb of the grounds it is also asserted by Ms Malik, although not in the written grounds, that the First-tier Tribunal erred in failing to adjourn the hearing to enable the appellant to obtain expert evidence.

8. Dealing with these challenges in turn, I observe that the Home Office bundle was sent to the address provided by the appellant for service in good time for the hearing. Nevertheless, assuming the appellant to be correct in his assertion that he did not receive the bundle prior to the hearing, it is important to identify exactly what documents the Home Office bundle contained.

9. Pages 1 to 4 of the bundle are a combination of a cover letter and an index to the bundle. Pages 5 to 36 contain copies of the appellant's own application form for leave, which he has signed but which in any event contains very little information. At page 37 there is a copy of a page from the appellant's passport. Pages 38 and 39 comprise of a cover letter to the application form, which amongst other things lists the eleven documents attached to the appellant's application form and sent to the SSHD.

10. As far as I can ascertain, and Ms Malik did not suggest to the contrary, the only other documents in the bundle are:

    (i) The decision letter under challenge - which the appellant has plainly read because he appealed against that decision and engaged with the refusal letter in the appeal documentation;
    (ii) The appellant's notice of appeal to the First-tier Tribunal – which originated from the appellant;
    (iii) A copy of the Home Office's database relating to the appellant's visit visa application in 2009;
    (iv) A one-page extract from a June 2017 Home Office document, which sets out the details of the *"Treatment of liver and kidney conditions"* in Nigeria
    (v) A four-page internet print out relating to a *"Nephrology, Kidney Transplant & Dialysis Center"* in Nigeria; and,
    (vi) A three-page internet print out relating to *"Kidney Solutions Ltd"*

11. As already indicated, the appellant has engaged with the first of the documents and the second was sent by the appellant to the SSHD. The third document is a brief summary of the appellant's 2009 visit visa application, with the relevant section being summarised in the decision letter under challenge. The fourth to sixth documents relate to the SSHD's assertion that there is available treatment in Nigeria. Each document is

summarised in the decision letter under challenge, with hyperlinks also provided.

12. I have also considered the First-tier Tribunal's Record of Proceedings. The appellant was put on notice of the contents by First-tier Tribunal judge Fisher of 26 April 2019, when refusing permission to appeal at first instance. The Record of Proceedings, which are a contemporaneous handwritten note of the proceedings taken by the judge, state as follows:

> "p56 of R's bundle? Not seen that doct before. I don't think. I recognise the other docts in the bundle."

13. Page 56 of the Home Office's bundle is part of the summary of the appellant's visit visa application from 2009. The passage relied upon by the SSHD therein refers to the whereabouts of the appellant's family members in 2009. This passage is referred to and summarised in the decision letter.

14. In short, there was nothing of significance in the respondent's bundle which the appellant would not have been aware of prior to the hearing. Most of the bundle comprises of documents which the appellant has produced. The appellant was also clearly aware of the decision letter, and the only documents in the bundle which the appellant would not have previously seen (assuming that he did not receive the bundle when it was sent prior to the hearing) are appropriately summarised in the decision letter. At the hearing the appellant identified only one page that he stated he was not aware of. That page contained one matter of potential relevance to the appeal, which the decision letter had previously summarised and upon which, in any event, questions were asked of the appellant at the hearing.

15. Looking at all the material in the Home Office bundle for myself I do not accept that there has been procedural unfairness by the First-tier Tribunal in failing to provide the appellant an adjournment of the hearing in order that he may have more time to consider the Home Office bundle.

16. The second limb of the unfairness challenge is founded on the failure of the First-tier Tribunal to adjourn the hearing to enable the appellant to obtain expert evidence as to the position in Nigeria for persons with his condition. This is not an assertion made in the written grounds and, in any event, is wholly unarguable.

17. The appellant did not seek an adjournment to enable him to obtain further evidence. He had ample opportunity prior to the hearing to either obtain such evidence or begin the process of doing so. There is no suggestion he took any such steps, indeed there is still no indication that the appellant has sought to obtain, even tentatively, evidence from an expert which might shed a positive light on his case in this regard. The appellant has, since the date of the SSHD's decision in October 2018, been aware of the SSHD's position. It was not for the First-tier Tribunal to make the

appellant's case for him. Fairness in proceedings does not just mean fairness to the appellant. The proceedings as a whole must be fair – there being two parties to the proceedings.

18. I am fully alive to Ms Malik's assertion that the SSHD accepted that the appellant may (and I emphasis may) not be able to afford treatment upon return, but this does not go to the issue of the fairness of proceedings and the need for an adjournment. This was a matter to be taken in the round when dealing with the substance of the case. The First-tier Tribunal's task is to ensure that there is a fairness of proceedings and to determine the appeal on the evidence available and, in my conclusion, on the information available there is no reason why the First-tier Tribunal should have sought of its own volition to adjourn the proceedings to ascertain, on a speculative basis, whether the appellant could obtain expert evidence in relation to an issue which was ventilated in the refusal letter.

19. I find that, when looked as a whole, the proceedings before the First-tier Tribunal cannot be said to be vitiated by procedurally unfairness.

20. Turning then to the second limb of the grounds, which relates to the substance of the human rights claim. This limb can be subdivided into three related submissions:

    (i) First, it is asserted that the First-tier Tribunal should not have accepted the assurances of the respondent as the ability of the appellant to travel to Nigeria and obtain treatment upon return.
    (ii) Second, a ground developed at the hearing today, it is asserted that the First-tier Tribunal failed to adequately engage with to take into consideration the fact that the cost of relevant treatment in Nigeria was prohibitive; and,
    (iii) Third, it is said that the First-tier Tribunal erred in concluding that evidence was such that it does not surmount the high threshold set out in N v Secretary of State [2005] UKHL 31.

21. I do not accept that any of these grounds are made out.

22. In relation to the assurances given by the Secretary of State, these are framed as follows in the decision letter:

> "Consideration has been given to travel to return to Nigeria. You have provided no documentary evidence to confirm that you are unfit to fly to Nigeria. It is therefore accepted that you could fly to Nigeria whereby appropriate safeguards can be put in place to ensure your health and well-being….
>
> The Home Office Assisted Voluntary Returns Scheme can ensure that appropriate safeguards are put in place pre/post departure, ensuring you have sufficient medication whilst making arrangements for a suitable after-care package upon return. Additionally, you may be eligible for financial assistance to aid with your re-integration into Nigeria"

23. The First-tier Tribunal dealt with this issue, thus:

> "[17] …the Respondent has confirmed that appropriate safeguards can be put in place both pre and post departure to enable the appellant to travel safely as recommended by Dr Ayab. Financial assistance is also available with the Assisted Voluntary Returns Scheme."

24. I have already detailed Dr Ayub's evidence on this issue. It is possible for the appellant travel, *"if it is done in such a way that he gets his dialysis before and immediately when arriving in Nigeria…he can be left without dialysis for 48 hours."*

25. The Secretary of State did not assert either before the First-tier Tribunal or before this Tribunal that she did not intend to stand by the assurances set out in the decision letter and referred to by the First-tier Tribunal – neither does this appear to be the appellant's case.

26. In such circumstances, it is my view that the First-tier Tribunal was perfectly entitled to take account of such assurances. On the basis of the available information it was not necessary for the First-tier Tribunal to delve further into the minutia of how those assurances would be adhered to out in practice. It is plain that the Secretary of State understood the needs of the appellant insofar as those needs are set out in the medical evidence. There was no evidence from the appellant to support a contention that there was no possible solution which could enable him to travel – indeed such a contention would appear to be directly contradictory to the medical evidence that the appellant relies upon. In my conclusion, the First-tier Tribunal was perfectly entitled to accept, absent any evidence to the contrary, that the Secretary of State will ensure that dialysis windows are adhered to.

27. The second limb of this ground relates to the consequences of the treatment in Nigeria not being available free of charge. Ms Malik's formulation of this, previously unpleaded, ground asserts that the First-tier Tribunal failed to take into consideration the prohibitive cost of the dialysis required by the appellant.

28. This ground is disposed of by the finding at paragraph 16 of the First-tier Tribunal's decision that it is not likely that the cost of treatment would be prohibitive. The First-tier Tribunal's rationale for this conclusion is clearly set out: (i) there was no specific evidence as to the cost of the treatment in Nigeria; (ii) the appellant has been able to undertake work in the UK and receive support from the church; (iii) the appellant will receive financial assistance under the Assisted Voluntary Return Scheme; and, (iv) it is likely the appellant will have family support available to him upon return.

29. Although Ms Malik again drew attention to the reference in the decision letter that the appellant may not be able to afford to pay for the treatment in Nigeria, in my conclusion, on the limited evidence that was available to

the First-tier Tribunal, it was open to it to find that the cost of treatment in Nigeria would not be prohibitive.

30. The third ground makes the overarching assertion that the evidence before the First-tier Tribunal demonstrated that there would be a breach of Article 3 should the appellant be returned to Nigeria, and that the conclusion to the contrary is wrong.

31. To put the ground in context, Article 3 may only prevent removal of a foreign national from the United Kingdom in very exceptional circumstances in a medical or health case. The scope of that phrase in the present context was settled in domestic law by N v the Secretary of State for the Home Department [2005] UKHL 31 with Lord Hope giving the leading speech in which he derived from Strasbourg authorities the following:

> *"For the circumstances to be very exceptional it would need to be shown that the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering whilst he is dying."*

Baroness Hale and Lord Brown framed the threshold for an Article 3 breach in similar terms. This approach was later endorsed by the Grand Chamber of the ECHR in N v United Kingdom [2008] 47 EHRR 39.

32. I find that the First-tier Tribunal properly directed itself to the law and lawfully applied such direction to the factual matrix before it, coming to a conclusion which was not only open to it but, in my conclusion, was inevitable given the findings of fact it had previously made.

33. Whilst the First-tier Tribunal also engaged with the threshold identified in Paposhvili v Belgium [2017] IAR 867, concluding that the appellant could not succeed if such a threshold is applied, this is no more than *obiter* and I need not engage with this finding, or the challenge thereto, given the application of the principle of *stare decisis* requiring the First-tier Tribunal (and indeed this Tribunal) to apply the binding House of Lords authority of N v SSHD, and not any variant to be derived from the decision in Paposhvili. Whilst I am aware that the Supreme Court is shortly to consider the implications of Paposhvili, until it has done so I remain bound by N v SSHD. On the evidence available to the First-tier Tribunal I find that its conclusion, applying the N threshold, was not irrational or otherwise vitiated by legal error.

Decision

The appeal is dismissed

Signed
Mark O’Connor
Upper Tribunal Judge O’Connor
8 November 2019