Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001838
UI-2022-001839

on appeal from HU/02176/2021
HU/02177/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th August 2022	**On 5th October 2022**

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

NONTLONIPO [M]
LAKEISHA [T]
[NO ANONYMITY ORDER]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Mohsin Aslam of Counsel, instructed by Chancery Solicitors
For the respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission from the decision of First-tier Tribunal Judge Hussain, promulgated on 9 March 2022, dismissing their

appeals against the respondent's decision dated 4 March 2021, refusing their human rights claims made on 25 August 2020, for leave to remain in the UK on the basis of their Article 8 ECHR private life.

2. The appellants are nationals of South Africa, a mother and her 5 year old son, born in 2016.

3. In particular, the appellants contend that the First-tier Judge should have adjourned the hearing to enable consideration by the respondent of the introduction of a 'new matter' (the principal appellant's HIV/AIDS status and treatment) which was raised in these proceedings just over two weeks before the First-tier Tribunal hearing and which the First-tier Judge treated as a 'new matter'.

4. Section 85(4) of the Nationality, Immigration and Asylum Act 2002, provides that on an appeal under section 82(1) against a decision, the Tribunal must not consider a 'new matter' unless the Secretary of State has given the Tribunal consent to do so: see section 82(5).

Background_

5. The principal appellant claimed to have entered the UK on 28 August 2003, aged 30, on a work permit. There is evidence of her having worked from 2004-2009 and the respondent accepts that she was in the UK by 2004.

6. The appellant was pregnant in 2012, but lost her baby. During her treatment, she was diagnosed with, and treated for, tuberculosis, an AIDS-defining illness. She was found to be HIV-positive. She has been receiving successful anti-retroviral treatment since then, including an investigation on her kidneys, which remain under review. Her tuberculosis is fully treated and she has no CD4 load at present.

7. On 3 April 2013 the appellant submitted an application for leave to remain outside the Rules, which was rejected as no fee was paid. She made an application for asylum which was refused and certified on 25 March 2015.

8. In 2016, the appellant gave birth to a son, the second appellant, whose father was from Zimbabwe. Her son is a South African citizen. The appellant is a lone parent. The child has started primary school in the UK but is not yet six years old. The appellant claims to have no contact with her siblings and parents in South Africa.

9. The 2013 application was reconsidered and on 14 July 2017 it was refused again and certified clearly unfounded.

10. On 28 September 2018 the appellant applied unsuccessfully for indefinite leave to remain. The appellant did not challenge the refusal decision.

11. On 25 August 2020, the appellant applied for leave to remain in the UK on private and family life grounds. She made no mention of her health, her HIV/AIDS status, or her treatment regime.

Reasons for refusal

12. On 4 March 2021, the respondent refused the private and family life application. Her reasons may be summarised thus:

13. **Principal appellant.** The respondent set out the principal appellant's immigration history. Her claim was considered under the private life route only. She did not meet the eligibility requirements of sub-paragraphs 276ADE (1)(iii) – (vi) of the Immigration Rules HC 395 (as amended).

14. There were no exceptional circumstances, applying paragraph GEN.3.2.3 of Appendix FM to the Rules, nor had she demonstrated very significant obstacles to reintegration on return to South Africa.

15. **Second appellant.** The respondent considered the section 55 best interests of the second appellant, by reference to section 55 of the Borders, Citizenship and Immigration Act 2009 and paragraph 276ADE(1)(iv) of the Rules.

16. The second appellant was not yet 5 years old and his private and family life remained primarily focused on the principal appellant, who was only parent and primary carer. He had only just begun primary schooling and could continue it in South Africa. .

17. The respondent considered it reasonable to expect the second appellant to return to South Africa where he could continue to enjoy his family life with his mother. There was no evidence to indicate that his mother would be unable to maintain him in South Africa or that she would be unable to provide for his safety and welfare.

18. Nor had the appellants demonstrated any unjustifiably harsh consequences for him or 'another family member'. There were no exceptional circumstances in his case.

19. The appellants appealed to the First-tier Tribunal, making no mention of any health issues relating to the principal appellant.

First-tier Tribunal decision

20. At the hearing before the First-tier Tribunal on 20 December 2021, there was no presenting officer representing the respondent.

21. At the commencement of the hearing, the appellants sought to rely on a late-filed supplementary bundle, containing additional grounds of appeal and supporting evidence. First-tier Judge Hussain asked that they be emailed to him and considered the additional grounds, which raised an issue not in the original grounds, namely that the appellant has HIV/AIDS and is receiving treatment for it in the UK. The Judge retired to consider the new grounds and the supporting evidence.

22. Counsel sought an adjournment to seek the consent of the respondent to the admission of the principal appellant's HIV/AIDS status as a 'new matter' by reference to section 85 of the Nationality, Immigration and Asylum Act 2002 (as amended), without which the First-tier Judge had no jurisdiction. She contended that the appellant could not have a fair hearing if this issue was not considered.

23. Judge Hussain refused the application to adjourn, finding that an application should have been made earlier to the respondent to consent to the new matter being added to the hearing. No good explanation had been forthcoming as to why that did not take place.

24. It was open to the appellant to make further submissions to the respondent based on her HIV status, but absent consent from the respondent, the First-tier Tribunal was not seised of the issue and could not determine it.

25. The appellants' claim therefore simply comprised their private life, and their family life together.

26. The principal appellant contended that it would be difficult for them to reintegrate, because was taking a combination of three HIV/AIDS drugs, but was unable to say whether all were available in South Africa. In particular, she considered that one drug, Moravec, would be too expensive for her to buy there.

27. The First-tier Judge found that the appellants had not demonstrated very significant obstacles to reintegration in South Africa.

28. The second appellant's section 55 best interests would be to live with his parent, in this case, his mother.

29. The First-tier Tribunal dismissed the appeal of both appellants.

30. The appellants appealed to the Upper Tribunal.

Permission to appeal

31. In their grounds of appeal, the appellants continued to contend that the First-tier Judge should have adjourned the hearing to enable them to seek the respondent's consent to his dealing with the HIV/AIDS issues which were raised for the first time on 2 December 2021.

32. They relied on a letter from Newham General Hospital dated 18 November 2021, which referred to her HIV+ status and treatment. The appellants' solicitors had sent this letter to the respondent on 2 December 2021, as soon as they realised that her HIV/AIDS status was a potential issue in the appeal.

33. On 2 December 2021, as soon as they realised HIV/AIDS was an issue in the appeal, her solicitors had sent this letter to the respondent and the Tribunal as an additional bundle. They sought to argue that the appellant's

HIV/AIDS status was not a section 85 'new matter' and could be incorporated into the proceedings without the respondent's consent.

34. The appellants contended that the First-tier Tribunal had erred:

(1) By refusing the adjournment request, thereby depriving the appellants of a fair hearing. They argued that they had a legitimate expectation that the documents submitted with the additional grounds and supplementary bundle, would form part and parcel of the documents considered by the First-tier Tribunal; and

(2) In its approach to very significant obstacles to integration, by reason of the asserted absence of family support for the appellants in South Africa, her severe and chronic health issues, and the country situation generally, in particular the difficulty in accessing treatment for her HIV/AIDS health issues, for which she would be unable to pay.

35. First-tier Judge Grey granted permission to appeal, in the following terms:

> "2. The Grounds assert that the Judge erred in refusing the Appellants' application for an adjournment at the hearing of 20 December 2021. The Appellants sought to rely on the first Appellant's medical condition as disclosed in the letter from Barts Health NHS Trust dated 18 November 2021 which referred to the first Appellant's HIV+ status. The letter was included in the Appellants' additional bundle filed and served on 2 December 2021. The Judge considered, quite properly, that the first Appellant's medical conditions amounted to a new matter and in the absence of consent from the Respondent to consider the new matter, declined to consider this in the context of the Appellants' human rights claims. The Judge refused the Appellants' adjournment application because no adjournment had been made prior to the hearing and because the Tribunal had no power to compel the Respondent to take a position on the new matter.
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> 3. Applying the guidance from *Nwaigwe* (adjournments: fairness) [2014] UKUT 00418(IAC), it is arguable that in refusing the Appellants' adjournment application the Appellants were deprived of their right to a fair hearing. The Respondent was unrepresented at the hearing. Whilst the Tribunal could not compel the Respondent to take a position on the new matter raised, it would have been open to the Respondent to consent to the consideration of the new matter, should she have had the opportunity to do so."

36. There was no Rule 24 Reply filed by the respondent.

37. That is the basis on which the error of law issue came before the Upper Tribunal today.

Supplementary bundle

38. We have been provided with a copy of the supplementary bundle, which includes a letter dated 18 November 2021 from Dr Simon Limb, the principal appellant's consultant physician at the Department of Infection and Immunity at Newham Hospital, part of Barts Health NHS Trust, who stated that he had been looking after her 'for many years' after her

transfer there from Homerton hospital. The appellant had already had a 'serious AIDS-defining illness (tuberculosis)' but had been fully treated for that. Her viral load was fully suppressed: she was taking an unusual anti-retroviral combination of Darunavir, Ritonavir and Maraviroc.

39. Dr Lumb did not know whether the appellant's anti-retroviral regime could be replicated in sub-Saharan Africa, particularly Maraviroc, 'which we seldom use at this time'. He enclosed a copy of a letter dated 30 June 2017, sent for the appellant's previous asylum claim.

40. That letter is not before us but we note that in the First-tier Tribunal bundle there was an asylum decision dated 5 September 2017 which considered the appellant's HIV/AIDS status substantively. At [97], the respondent recorded that:

> "97. Consideration has been given to your claim that you should be allowed to stay in the UK based on Article 3 of the ECHR on medical grounds. You claim that you were diagnosed with HIV after you became pregnant in 2012. You also suffered from tuberculosis, which you state that you have been treated for and have been given the all clear. You have also submitted documents from Barts Health NHS which have stated that you are being referred for a kidney biopsy. "

41. The respondent went on to analyse the available treatment in South Africa, by reference to information dated 2015 from the Refugee Documentation Centre of Ireland, concluding that suitable medical treatment was available in South Africa and that the principal appellant had not provided evidence that she would be denied medical treatment or would be unable to travel to obtain it. Discretionary leave was refused. The appellant did not appeal that decision.

Upper Tribunal hearing

42. For the appellants, Mr Aslam, who did not represent these appellants before the First-tier Tribunal, relied on the grounds of appeal. He referred to the appellants' immigration history. The First-tier Tribunal's decision was procedurally unfair because the respondent should have been given the opportunity to consent to the new matter pursuant to section 85(4) of the 2002 Act.

43. In response to a question from the Tribunal, Mr Aslam told us that Chancery Solicitors had been acting for the appellants since 2020: the previous firm in Brighton had referred the principal appellant to Chancery Solicitors because she was living in London and a firm of representatives there would be more convenient.

44. For the respondent, Mr Tufan submitted that the First-tier Judge had no choice: absent the respondent's consent, the First-tier Tribunal was not permitted to consider the HIV/AIDS issue as it was a 'new matter'.

45. It remained open to the appellants to make further submissions based on the evidence in the supplementary bundle, on which the respondent could make a fresh decision, but there was no material error of law in the First-

tier Tribunal decision on the issues before it and no procedural unfairness in the refusal to adjourn.

The *Nwaigwe* guidance

46. The guidance on adjournments given in *Nwaigwe* by Mr Justice McCloskey, then UTIAC President, was summarised in the judicial headnote:

> *If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.*

47. At [5] in the decision, President McCloskey explained further. He did so by reference to the pre-2014 version of the First-tier Tribunal Procedure Rules, commenting that a wider discretion would shortly be available under the 2014 amendment:

> "5. … As a general rule, good reason will have to be demonstrated in order to secure an adjournment. There are strong practical and case management reasons for this, particularly in the contemporary litigation culture with its emphasis on efficiency and expedition. However, these considerations, unquestionably important though they are, must be tempered and applied with the recognition that a fundamental common law right, namely the right of every litigant to a fair hearing, is engaged. In any case where a question of possible adjournment arises, this is the dominant consideration. It is also important to recognise that the relevant provisions of the 2005 Rules, rehearsed above, do not modify or dilute, and are the handmaidens, their master, and the common law right in play."

Analysis

48. The appellants appealed against the decision dated 21 March 2021 refusing their claims made on 25 August 2020 for leave to remain on the basis of their private life. The appellants did not raise any medical issues in support of that application and none were considered, although the principal appellant was fully aware of her HIV/AIDS status, which had been diagnosed in 2012. She had been receiving treatment for many years, and her HIV/AIDS status had already been the subject of an unchallenged international protection decision in 2017.

49. In her grounds of appeal to the First-tier Tribunal submitted on 17 March 2021, there was no reference to the principal appellant's medical condition, nor what effect it may have on her health if they were removed.

Nor was any country evidence adduced about what anti-retroviral regimes are available in South Africa.

50. It is disingenuous of the appellants' representatives to state that the HIV/AIDS issue was disclosed as soon as they became aware of it: the principal appellant had been aware of it for many years. That is a matter for the principal appellant and her representatives, but no proper reason has been advanced for raising the issue at such a late stage and without prior notice to the respondent. It is clear that further representations regarding the appellant's medical condition could and should have been made to the respondent well in advance of the First-tier Tribunal hearing.

51. We have considered the guidance in *Nwaigwe.* In this appeal, the appellants have not provided good reason, or any reason, for not advancing any relevant change in her HIV/AIDS status as a ground of claim or appeal in the 2020 human rights application or subsequent appeal. In fact, it appears that there is no such change, but the evidential position is unclear and that fortifies us in our view that the respondent should have been given a proper opportunity to consider the principal appellant's health.

52. The First-tier Tribunal had no jurisdiction to entertain the appellant's HIV/AIDS status as a 'new matter' in the human rights proceedings before it, and the Judge made no error in so finding.

53. We remind ourselves that under section 85(4) of the Nationality, Immigration and Asylum Act 2002, on an appeal under section 82(1) against a decision, the Tribunal must not consider a 'new matter' unless the Secretary of State has given the Tribunal consent to do so: see section 82(5). It is not appropriate for a First-tier Judge to be the primary decision maker on a 'new matter': the purpose of section 82(5) is to enable the respondent to consider and decide on the issue first.

54. Procedural unfairness is not established: indeed, we consider that it would have been a material error of law for the Judge to adjourn the appeal, given that he was not seised of the 'new matter' and no proper application to adduce it had been made to the Tribunal or the respondent before the hearing.

55. Mr Aslam did not make much of the remaining grounds, and neither do we. They are an attempt to reargue and reopen findings of fact, which on the evidence advanced were neither unreasonable nor irrational. We decline to interfere with the decision.

56. This appeal is accordingly dismissed.

DECISION

57. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law.

We do not set aside the decision but order that it shall stand.

Signed: *Clifford Maile* Date: 26 August 2022
Deputy Upper Tribunal Judge Mailer