Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06235/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 March 2019	**On 26 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

GM (ZAMBIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Shreshtra, Counsel instructed by Susan Paul Solicitors
For the Respondent: Mr Lawrence Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge MA Khan sitting at Hatton Cross on 25 September 2018) dismissing her appeal against the decision of the Secretary of State for the Home Department ("the Department") to refuse her human rights claim in which she maintained that her removal would breach her rights under Articles 3 and/or 8 ECHR, due to the absence of family and appropriate medical treatment in the country of return. The First-tier Tribunal did not make an

anonymity direction. But as the central issue is the appellant's state of health, I consider that an anonymity direction for these proceedings in the Upper Tribunal is appropriate.

Relevant Background

2. The appellant is a national of Zambia, whose date of birth is 15 January 1968. She entered the United Kingdom on 11 September 2004 with valid entry clearance as a student. She was granted leave to remain as a student on two occasions, with her last grant of leave to remain as a student expiring on 28 June 2012. She made an in-time application for further leave to remain as a student, but this was refused on 20 August 2012 with a right of appeal. Her appeal was dismissed on 16 January 2013, and the appellant became appeal rights exhausted on 13 March 2013. On 12 June 2015 the appellant was served with an RED.0001 notice, notifying her of her liability to detention and removal as an overstayer.

3. On 3 July 2015 the appellant applied for leave to remain on private life grounds. In support of the application, her former solicitors served a letter from the appellant's GP, dated 10 November 2015. Dr Chand said the appellant had been registered with their practice since 2010 and had been attending the surgery regularly for her medical conditions. Dr Chand continued: "*She had a stroke because of a rupture of aneurysm causing a subarchnoid haemorage (sic) followed by emergency surgery. She has great difficulty in walking now and is not able to cope by herself. She also had uterine fibroids which have been operated on very recently.*"

4. On 6 January 2016 the Department gave their reasons for refusing her application for leave to remain on the grounds that her removal would not place the UK in breach of its obligations under the Human Rights Act 1998. It was accepted that on 14 November 2013, following a fall, the appellant had suffered a stroke, requiring her emergency admission to hospital. She had successfully undergone an operation, but she was left with speech problems and muscular weakness resulting from her stroke. In July 2014 the Department of Neurosurgery at St George's Hospital, Tooting, had confirmed that she had walked into the clinic with a stick. She could communicate well. There was hardly any speech disturbance and mobility, and she was doing really well and had obviously worked very hard for her recovery. Although it was recommended that she would need yearly scans for the next five years, she was discharged into the care of the local authority (Royal Borough of Greenwich) which was currently supporting her as an adult under section 21 of the National Assistance Act 1948. The Local Authority Injury and Emergency Care Plan showed that she continued to receive an hour-long visit twice per day from a care worker to help her with washing, dressing and meal preparation. She had undergone separate surgery for the removal of uterine fibroids in April 2015. Her current medical treatment was confined to the prescription of medication for persistent headache.

5. Based on this information, it was not considered that her case met the threshold of **D -v- The United Kingdom [1997] 24 EHRR 423** or of **N -v- SSHD [2015] UKHL 31**. The evidence submitted did not show that the appellant was in the terminal stages of a life-threatening disease or condition. The medication she was being prescribed did not fall into the category of specialist medication, and "*such general drugs*" were widely available in Zambia. According to the MedCoi Database, there were also neurosurgeons in Zambia who could carry out neurosurgery for people who needed it, and they could also provide post-surgical care and monitoring.

6. It was not accepted that she was entirely without family members in Zambia who might reasonably be counted upon to provide the direct support that she was currently receiving, in order to be able to assist her in accessing appropriate care services in Zambia from a third-party provider. In her application for leave to remain made on 14 September 2005 she had included a letter from her uncle confirming that he was Managing Director of an investment company in Zambia; that he would be acting as her financial sponsor; and that he would take full responsibility for her.

7. The appeal was originally listed to be heard on 31 July 2017. At the request of her legal representatives, the appeal was put back until 12 noon on account of her medical condition. The appeal was called on at 1pm. The Judge adjourned the hearing because he was told that the appellant had had a seizure that morning.

8. The appeal was re-listed for 12 January 2018. On the day of the hearing, Counsel applied for a further adjournment. As recorded in Judge Hussain's record of proceedings, she said that she had met the appellant this morning, and had found her confused and forgetful. She had contacted one of her nieces who had said that she had become forgetful. In her view, the appellant was not medically fit to give evidence, but she recognised that she needed an expert medical report to confirm this. If she was not fit to give evidence, then the matter would have to proceed without her giving oral evidence. Judge Hussain granted an adjournment, and directed that the appellant should file an expert medical report on her cognitive state, and/or on any other issue, at least 28 days before the resumed hearing.

9. The appeal was re-listed for 25 September 2018. On 30 August 2018 her solicitors applied to the Tribunal for an adjournment. They said that the appellant could not attend the hearing due to her health issues. Her neurological assessment was due to take place on 14 January 2019. The Tribunal was asked to note that on the last occasion the appellant had lost her way home because of memory loss, stroke and other medical complications, and had gone missing. So the police had to be called to find her.

10. On 3 September 2018, the First-tier Tribunal informed the appellant and her solicitors that the adjournment request was being refused, as the

appellant had not provided any police reference or medical evidence to substantiate the claims made in the letter of 30 August 2018.

11. Her solicitors renewed the adjournment request on 11 September 2018. On 12 September 2012, the First-tier Tribunal re-refused the adjournment application as the medical letter relied upon did not state that the appellant was not fit to attend the hearing; and it was not in the appellant's interests for the appeal to be delayed.

The Hearing Before, and the Decision of, the First-tier Tribunal

12. Both parties were legally represented before Judge Khan. Mr Rasheed of Counsel appeared on behalf of the appellant.

13. As recorded in paragraphs [6]-[8] of the subsequent decision, at the outset of the hearing Mr Rasheed applied for an adjournment on the grounds that the appellant was not in attendance at the hearing due to her ill-health. He acknowledged that there was no medical evidence to say that she was unable to attend the hearing and give evidence. But he had been informed by his instructing solicitors that the appellant was unwell. The application was opposed by the Presenting Officer.

14. The Judge refused an adjournment on the grounds that the appellant had failed to provide any medical evidence to show that she was unfit to attend the hearing and to give evidence before the Tribunal. He noted the procedural history. He also noted that the request for an adjournment made on 11 September 2018 had been supported by a letter from Dr Asra Saddiqi, Consultant Neurologist, dated 16 April 2018:

> "Dr Saddiqi states that he suggested to the appellant that she take Paracetamol instead of Co-codamol for her headaches. The letter sets out the medical history but does not state that she is unable to attend Court and not able to give evidence."

15. The Judge went on to hear the appeal on a submissions only basis. In addition to the two bundles of documents previously filed on 12 April and 9 June 2017 respectively, he was provided with a third bundle of documents by Mr Rasheed, the contents of which are listed at paragraph [9] of his decision.

16. The Judge set out his findings at paragraphs [17]-[31]. At paragraph [21], he found that the appellant had failed to establish her case under Article 3 ECHR, which under the case law of **D** and **N** established a very high threshold. The appellant had to be in a state of dying to succeed under this test, and that was not the case here.

17. Considering her case under Article 8 ECHR, there was little evidence to suggest that due to her medical condition she would not be able to live on her own. She would be able to access medical care in Zambia, which might not be to UK standards, but was available. The appellant stated that she had no other family in Zambia, as her sponsor had died in a car accident. But there was no evidence of the sponsor's death in the form of a death certificate. So he did not accept that she would be without any family in Zambia. On return, she could access medical treatment and

seek assistance from her family members, for whatever little care she might need.

The Application for Permission to Appeal to the Upper Tribunal

18. The appellant formulated her application for permission to the Upper Tribunal with the assistance of her niece, "N".

19. The first ground was that Judge Khan had been wrongly advised that the appellant could not be present at the appeal due to her ill-health. In fact, she had attended the offices of her solicitors the day before the hearing, and was advised not to attend the hearing. The advice was given by the solicitor on the ground that they were awaiting further medical evidence. It was not the case that she could not attend Court due to her ill-health. That was not the reason given to her. The appellant had not attended due to the "*conflicting advice*" given to her by her solicitors, and thus she was deprived of the opportunity to give oral evidence. In addition, her family, friends and church members were also advised not to come to the Tribunal on 25 September 2018. So, the adjournment was refused on "*false pretences".* Secondly, there was an inadequate assessment of the appellant's family life established in the UK. Thirdly, the Judge had failed to give adequate consideration as to whether there would be significant obstacles to her reintegration into Zambia, given her medical condition.

The Reasons for the Initial Refusal of Permission to Appeal

20. On 30 November 2018 First-tier Tribunal Judge Lambert refused permission to appeal for the following reasons: "*There was here no arguable procedural error or error of law by the Judge. The adjournment request was properly refused; the appellant's evidence was properly considered in her absence. Whether her contentions may amount to a valid claim against her then solicitor is a matter for her to pursue elsewhere as she sees fit."*

The Renewed Application for Permission to Appeal to the Upper Tribunal

21. The renewed application for permission to appeal was settled by Susan Paul Solicitors. They pleaded that the Judge had erred by not considering the evidence that was before him when making his decision. He ought to have considered the various pieces of medical evidence before him and to have adjourned the hearing. The appellant was not a person who was fit to give evidence. It was accepted that she did not meet the requirements of Appendix FM or Rule 276ADE. But the Tribunal was requested to allow the appeal outside the Rules on medical grounds.

The Reasons for the Eventual Grant of Permission to Appeal

22. On 1 February 2019 Deputy Upper Tribunal Judge Roberts granted permission to appeal for the following reasons: (a) it was arguable that the Judge hearing the initial appeal had failed to give clear and proper reasons in his conclusions when assessing the medical evidence presented on the appellant's behalf; (b) he had arguably failed to take into account that the

appellant was currently under treatment and ongoing consultant review for her condition; and (c) his analysis at paragraph 22 appeared contradictory.

The Hearing in the Upper Tribunal

23. At the hearing before me to determine whether an error of law was made out, Mr Shreshtra applied for an adjournment as he had only been briefed the day before by Susan Paul Solicitors. His explanation for this was that they had not received the notice of hearing directly from the Upper Tribunal, but had instead only received it via the appellant. Mr Tarlow opposed the adjournment. I ascertained from the appellant that she had not left it to the last moment to inform her new solicitors of the hearing date. In addition, I did not consider that the late delivery of a brief to Counsel meant that the appellant's case could not effectively be presented by him. Accordingly, I ruled against the adjournment request on the ground that procedural fairness did not require an adjournment.

24. Mr Shreshtra took me through the evidence that was before the Judge. He submitted that the Judge ought to have granted an adjournment as the appellant was unwell. Alternatively, he submitted that the Judge's disposal of the Article 3 medical claim was flawed, as he had not engaged with the argument that it should succeed on the basis outlined in **AM (Zimbabwe) [2018] EWCA Civ 64**.

25. In reply, Mr Tarlow adopted the reasoning of Judge Lambert. He submitted that the conclusions reached by the Judge were sustainable and adequately reasoned.

Discussion

26. The most up-to-date medical evidence is the report of Dr Siddiqi which was made on 23 May 2018, following an examination of the appellant at her clinic on 16 April 2018 when she was accompanied by her aunt (who also accompanied the appellant to the hearing before me).

27. It was open to the Judge to hold that this report did not establish that the appellant was unfit to attend the hearing scheduled to take place on 25 September 2018. It was also open to the Judge to find that neither this report, nor any of the medical evidence which preceded it, established that the appellant was unable to give evidence.

28. Dr Siddiqi recorded the appellant's aunt as telling her that the appellant had remained well until January 2018 when she had seizures, which had come on after she had been cross-examined in court. It is apparent from the Record of Proceedings that this is not true. The hearing did not go ahead, and so the appellant did not give evidence. In addition, there was (and is) no medical evidence that there was a risk of the appellant having seizures if called as a witness in September 2018. Further, when making the adjournment request, Mr Rasheed did not assert that the medical evidence before the Judge made out a case that the appellant was unable to attend a hearing and to give evidence. He simply relied on the fact that these were the instructions he had received from his Instructing Solicitors.

29. In her application for permission to appeal to the Upper Tribunal, the appellant accepted that she was fit to attend the hearing on 25 September 2018. Accordingly, the Judge's decision to refuse the adjournment request has been vindicated by subsequent information made available to the Upper Tribunal. By the same token, the appellant has not made out a case that it was procedurally unfair for the Judge to hear her appeal in her absence.

30. As the Judge noted at paragraph [14], Mr Rasheed relied on paragraph 183 of **Paposhvili -v- Belgium** (Application number 41738/10) for the proposition that the appellant's situation was one of those "*other very exceptional cases"* within the mean of the judgment in **N -v- The United Kingdom**, where, in considering Article 3 ECHR, the Judge should find that the appellant's removal would mean that, although she was not at imminent risk of dying, she would be exposed to a serious, rapid and irreversible decline in her health, which would result in intense suffering or a significant reduction in her life expectancy.

31. In **AM (Zimbabwe**) Sales LJ, giving the leading judgment of the Court, held at paragraph [40] as follows:

> "It is impossible to infer that the formula used in para. [183] of Paposhvili the ECcHR intended to reverse the effect of *N -v- The United Kingdom*. Moreover, the Grand Chamber's formulation in para. 183 requires there to be a "serious" and "rapid" decline in health resulting in intense suffering to the Article 3 standard where death is not expected, and it makes no sense to say in the context of analysis under Article 3 that a serious and rapid decline in health is not a requirement where death rather than intense suffering is the harm expected. In my view, the only tenable interpretation of para. [183], read in context, is the one given above."

32. In the light of the above ruling by the Court of Appeal, it was not an error of law on the part of the Judge to follow **N -v- The United Kingdom**. In addition, on the medical evidence provided, the appellant fell very far short of showing that there were substantial grounds for believing that she faced a real risk of a serious and rapid decline in her health resulting either in intense suffering to the Article 3 standard, or death in the near future, if removed to Zambia.

33. Turning to the Article 8 claim, I do not consider that the Judge's analysis at paragraph [22] was contradictory. It was open to the Judge to find that the appellant would be able to live on her own in Zambia, given that she was living on her own in the UK. Although a carer attended at her home in the morning and the evening, "*it appears that she manages on her own for the rest of the time."* While it would be desirable for the appellant to enjoy a similar level of care in Zambia, it did not follow that the absence of such care provided by the State would violate her rights under Article 8 ECHR. It was open to the Judge to find that the appellant would not be without family support in Zambia, and hence would not be bereft of care and support, for the reason which he gave.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 12 March 2019

Deputy Upper Tribunal Judge Monson