Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11443/2018

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Decision & Reasons Promulgated**
On 5 February 2019	**On 4 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Appellant</u>

and

MS O A
(ANONYMITY DIRECTION MADE)

<u>Respondent</u>

<u>Representation</u>:
For the Appellant: Mr T Lindsay, Home Office Presenting Officer
For the Respondent: Ms U Dirie, Counsel instructed by G Singh solicitors

<u>DECISION AND REASONS</u>

1. The Respondent, to whom I shall refer to as the Claimant, is a national of Nigeria born on [~] 1966. Although this is not an asylum claim I will be making an anonymity order due to her personal history and circumstances. The Claimant arrived in the UK in March 2005 with entry clearance as a visitor. She thereafter overstayed and applied for leave to remain under the private and family life ten year route on 30 April 2015, which application was ruled invalid. After further applications and a pre-action protocol letter being sent to the Secretary of State, the Claimant

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made an application on 19 December 2017 for leave to remain on the basis of her private life, which application was refused on 10 May 2018.

2. The primary basis of that claim was that the Claimant was suffering from serious mental health problems as a result of being a victim of domestic violence from her former husband in Nigeria, which had been exacerbated by a period in immigration detention in the UK. Reliance was placed upon a psychiatric report from Dr Singh dated 14 December 2017, the contents of which the Secretary of State apparently accepted, but he refused to grant the application for leave to remain either within the Rules, or on the basis that there were exceptional circumstances justifying the grant of leave outside the Rules.

3. The Claimant appealed and her appeal came before Judge of the First-tier Tribunal Freer for hearing on 1 October 2018. In a decision and reasons promulgated on 11 October 2018 the judge allowed the appeal with reference to paragraph 276ADE(1)(vi) of the Rules and the Claimant's human rights.

4. The Secretary of State has sought permission to appeal in time to the Upper Tribunal on the basis of five grounds.

    (1) That the judge's approach to the Claimant's medical claim was fundamentally flawed in that he failed to consider Article 3 first and thus his assessment of Article 8 was flawed.

    (2) The judge failed to apply the proper stringent test set out in J [2005] EWCA Civ 629.

    (3) The judge failed to have regard to the judgment in KH (Afghanistan) [2009] EWCA Civ 1354 at [32] and [33] as to the lack of family ties in Nigeria and the judge failed to give adequate reasons as to why measures could not be put in place in Nigeria to assist the Claimant in respect of adherence in taking medication and accommodation.

    (4) In assessing paragraph 276ADE of the Rules, the judge failed to consider relevant matters, for example whether the cost of any medical treatment could be met by family and friends in the UK and he made a material error of fact in finding there is only one NGO that would be available to support the Claimant, which was based on a misreading of the Secretary of State's refusal letter which provides "*Project Alert is a non-governmental women's rights organisation set up in January 1999 which offers a support service programme in relation to counselling, legal aid and shelter in Nigeria which may be of use to you at page 5 of 8 refusal decision*" and the judge failed to take account of the fact that the Claimant had previously obtained medical assistance in relation to her health whilst in Nigeria.

    (5) The judge erred at [56] in finding that section 117B(6) of the NIAA 2002 was applicable to the Claimant in the light of the fact there was nothing to suggest the Claimant has a parental relationship with a qualifying child in the UK.

5. Permission to appeal was granted by Upper Tribunal Judge Jackson on 31 December 2018 on the basis,

> *"Although the decision of the First-tier Tribunal discloses some consideration of the tests in J and refers to the Appellant's case on a narrow view not fitting the requirements of Section 117B(6) of the NIAA 2002, it is arguable that the consideration of the factors in J is insufficient and inadequately reasoned and the factors in Section 117B not properly applied in the balancing exercise. There is arguably a lack of consideration of the medical treatment previously obtained in Nigeria by the Appellant and that available on return in addition to the question of whether she could realistically access this for cost or practical reasons."*

Hearing

6. At the hearing before the Upper Tribunal, Mr Lindsay on behalf of the Secretary of State sought to rely on the grounds of appeal, which he submitted could be crystallised into two points: firstly, that the Claimant previously received medical treatment in Nigeria but then the judge did not go on to make any relevant findings as to what treatment had been received and whether it could reasonably be resumed in Nigeria and if not what very significant obstacles she would encounter. He submitted that Dr Singh makes no mention of the facilities for medical care in Nigeria as the judge noted at [24] and the judge erred in allowing the appeal on this basis.

7. Mr Lindsay submitted that the key dispositive finding is at [46] where the Judge found that the Claimant's mental state is such that she cannot be relied upon to access the limited help offered by the NGO and given the absence of evidence, it is unclear to what the judge is referring; his finding is unsupported by reasons and does not appear to be tied to any of the evidence referred to. He submitted that the finding *"that there was no other possible support in Nigeria"* was a very problematic finding and was a result of a misreading of the refusal letter. The fact that the Secretary of State has referred to one NGO does not mean that there is only one NGO. He submitted this is an error and was clearly material to the outcome of the appeal. In respect of the judge's finding at [48] it was not certain the Claimant could not afford medication on return. Mr Lindsay submitted that the judge had failed to make a finding on a material matter in that he failed to consider whether the Claimant could be supported and assisted by family and friends in the UK.

8. In respect of ground 5 and the judge's finding at [56] Mr Lindsay submitted that the Claimant's son in the UK was an adult and thus she had no qualifying child that would bring her within the parameters for consideration under Section 117B(6). Mr Lindsay submitted that he was bound to accept that if the Claimant cannot be relied upon, as the judge found at [46] to access help on return, then the appeal must succeed.

However, the concern of the Secretary of State is that the judge had not given reasons for his finding and had not tied this to any of the evidence on appeal.

9. He submitted that Dr Singh's evidence does not deal at all with the facility the Claimant would need on return to Nigeria, which goes directly to the judge's consideration of the Rules in the first instance and thus fatally undermines his consideration of Article 3 and 8 of the ECHR. Mr Lindsay again accepted where proper regard was had to all the evidence the appeal was clearly capable of succeeding, but given the carefully drafted refusal letter it was also an appeal that was capable of being dismissed. The judge's failures undermine his findings and a re-hearing was required.

10. In her submissions, Ms Dirie commenced by stating that this was a case where the medical evidence had not been disputed by the Secretary of State. The Claimant had been diagnosed by a consultant psychiatrist as having severe depression, anxiety disorder and PTSD, arising from her experience of being a victim of severe domestic violence in Nigeria, which had been exacerbated by spending a period of time in immigration detention in the UK. In respect of the finding at [46] that there was no support for the Claimant, she drew my attention to [24] of the judge's decision where the judge had stated that Dr Singh's report has made no reference to facilities in Nigeria. However, she submitted that this was erroneous in that Dr Singh's remit was to access the Claimant psychiatrically; Dr Singh is not a country expert so it would not have been appropriate for her to give her opinion about the availability of facilities in Nigeria. Ms Dirie submitted what is clear from [46] and the Secretary of State's refusal decision is that the NGO, Project Alert, is a women's organisation and there is no evidence that it could provide support for the Appellant's mental health problems.

11. Ms Dirie drew my attention to the fact that three documents had been handed up with the Claimant's skeleton argument and were appended to it, which do address the issue of mental health provision in Nigeria *viz* (i) a report from the World Health Organisation 2011; (ii) a report from the Integrative Journal of Global Health 2017 Volume 1 No 1:5 and (iii) a DFAT country information report on Nigeria dated 9 March 2018. She submitted that it was this evidence upon which the judge relied in finding there would be limited sources available to the Claimant. Ms Dirie submitted that [46] was a conclusion the judge came to having considered the medical evidence and having accepted the Claimant's evidence and those of her witnesses that there was no family support in Nigeria. The judge was clear and had at the forefront of his mind the absence of a support network and this was clearly material to an assessment of whether there were very significant obstacles to her integration there.

12. In respect of the risk of suicide and the J test, it was accepted the Claimant had a subjective fear of her ex-husband. She submitted the judge's finding that there were very significant obstacles to the Claimant's integration was sustainable. She submitted that the points raised by the

Secretary of State in respect of section 117B(6) is a mischaracterisation of the judge's finding at [56] where he was quite clear that the Claimant does not fall under this paragraph, but simply recognises she has a family life with her grandson and read with [57] that all her ties are in the UK and not Nigeria. In relation to the test in J, Ms Dirie accepted the judge may not have addressed all six points but he had dealt with all the material points. She submitted it was a detailed and careful decision and the Secretary of State's challenge amounted to no more than a disagreement with the judge's findings which were open to him on the evidence.

13. In reply, Mr Lindsay submitted that [46] really was the crux of the issue if the sentence *"there is no other possible support in Nigeria"* was not to be found in the determination it may have been sound however it could not be said the outcome would have been the same without that sentence. There might be other NGOs which the Claimant could rely upon and access and the judge had made a clear error in finding there was no other possible support for the Claimant in Nigeria.

14. I reserved my decision, which I now give with my reasons.

Findings and reasons

15. I find there is merit in Ground 2 of the grounds of appeal, in that it is clear from [64] of the judgment that the Judge failed to give adequate reasons for finding that the Claimant meets all six aspects of the legal test for suicide risk, albeit he addressed some of the factors at [60]-[63] he failed to engage with the particularly high threshold because it is a foreign case; that the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state [the third factor] nor whether the Claimant's fear of ill-treatment is objectively well-founded [the fifth factor].

16. However, the Judge allowed the appeal in the alternative, on the basis that Article 8 was engaged in light of his finding that the Claimant met the requirements of paragraph 276ADE(vi) of the Rules. The fourth ground of appeal challenges the judge's finding in respect of paragraph 276ADE(vi) of the Rules. The Judge made *inter alia* the following material findings in this respect:-

> *"40. I find on the basis of credible evidence from multiple sources that the Appellant is terrified of her former husband, who with the help of his family appears to have been involved in extremely abusive behaviour ... I find that she has a very strong subjective fear that he may find her and then harm her all over again…*
>
> *44. The Appellant's entire family and her best friend are living in the UK. They provide a strong support network which does not exist in Nigeria.*
>
> *45. The Appellant has a private and family life in the UK ... Her relationships with her best friend, her son, her*

grandchildren, medical support and therapy staff are included in the scope of her private life. Due to her vulnerability there will be a very serious interference with her private life if removed, I find.

46. *There would be very serious obstacles to her integration in Nigeria. Her mental state is such that she cannot be relied upon to access the limited help offered by the NGO. There is no other possible support in Nigeria. Her strong subjective anxiety and PTSD and depression would affect how she considered her options. There is simply nobody there who knows her to stop her from committing suicide.*

47. *I have evaluated the situation in Nigeria in the light of material supplied including the 2011 WHO report, the 2017 article on Knowledge of and Attitude to Mental Illnesses in Nigeria from the Integrative Journal of Global Health and the Australian 2018 DFAT report on Nigeria which confirms the high level of stigmatisation.*

48. *If the Appellant was prescribed pills in Nigeria it is not certain she would have the money to buy them or would actually take them consistently if she did. The NGO is not itself a dispensing agency. She would present as very depressed and vulnerable at risk of theft or worse. The treatment in the UK has not yet resulted in such an improvement in her condition that I might reasonably find otherwise.*

49. *I appreciate that a lack of ties is not the same concept as obstacles to integration but it does go towards it. In a person with good mental health it would not be a tipping factor but her health is very poor.*

50. *I conclude that there are very significant obstacles to integration and that she meets the threshold of paragraph 276ADE(1)(vi) and should succeed on Article 8 within the Immigration Rules. Therefore, I find that the Rules have been satisfied in full.*

17. The Secretary of State asserts that the Judge failed to consider relevant matters, for example whether the cost of any medical treatment could be met by family and friends in the UK and that he made a material error of fact in finding there is only one NGO that would be available to support the Claimant, which was based on a misreading of the Secretary of State’s refusal letter which provides “*Project Alert is a non-governmental women’s rights organisation set up in January 1999 which offers a support service programme in relation to counselling, legal aid and shelter in Nigeria which may be of use to you at page 5 of 8 refusal decision*” and the judge failed to take account of the fact that the Claimant had previously obtained medical assistance in relation to her health whilst in Nigeria.

18. I have concluded that this ground of appeal does not raise a material error of law in the Judge’s decision. I find that the grounds of appeal have been drafted on the misapprehension that the case centred around the potential costs of any medical treatment, whereas it is clear from the psychiatric report, the contents of which the Secretary of State accepted, that the Claimant is at a high risk of suicide if removed to Nigeria, due to her subjective fear of her husband. Thus access to medication in this respect is immaterial and the Judge expressly accepted that at [46].

19. Whilst it is arguable that the Judge erred in finding that there was only one NGO who could assist the Claimant, based on the contents of the refusal decision, I find that this is not a material error for the reasons already provided i.e. that the high risk of suicide would arise prior to the Claimant being able to access support from any NGO *cf. Y & Z* [2009] EWCA Civ 362 at [61]. Further, the fact that the Claimant had obtained medical assistance previously in Nigeria fails to take into account that this was 17 years previously and that her mental health has deteriorated since that time, due to the threat of return: [28].

20. Mr Lindsay emphasised that it had not been open to the Judge at [46] to find “*there is no other possible support”* in Nigeria because there might be other NGOs to whom she could turn for support. However, read in the context of the Judge’s other findings, I find that what the Judge was referring to here was the absence of any support network from family and friends, having found at [44] that in the UK they provided “*a strong support network which does not exist in Nigeria.*” This finding was clearly open to him on the evidence that the only family members in Nigeria were her ex-husband, with whom she did not wish to be in contact due to the lengthy history of domestic violence, indeed, his presence there is clearly causative of her very strong subjective fear of return and a son, from whom she has been estranged for many years.

21. The relevant test for assessing whether there are very significant obstacles to integration is set out in *SSHD v Kamara* [2016] EWCA Civ 813, where the Court of Appeal per Lord Justice Sales held *inter alia* at [14]:

> *“14. ...the idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.*

22. I find that the Judge’s finding in respect of paragraph 276ADE(vi) is sustainable in light of the aforementioned test and there was no error of law in his decision to allow the appeal on human rights grounds (Article 8),

bearing in mind the judgment of the Senior President in *TZ (Pakistan)* [2018] EWCA Civ 1109 at [34] that:

> "... *where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."*

23. I have considered the remaining grounds of appeal, but ground 3 also fails for the reasons set out at [18] above. *KH (Afghanistan)* [2009] EWCA Civ 1354 at [32]-[33] was concerned with whether or not the high threshold for Article 3 in a "medical case" was met, which was not the argument before the Judge in this Claimant's case. I find that Ground 5 is misconceived in that it is clear from [56] that the Judge did not find that section 117B(6) of the NIAA 2002 was engaged by virtue of the Claimant's relationship with her grandchildren. Ground 1 does not take the matter any further, given that the Judge correctly considered first whether the Claimant met the requirements of the Immigration Rules and concluded that she did and then went on to consider her human rights.

Notice of Decision

The appeal by the Secretary of State is dismissed, with the effect that the decision of First tier Tribunal Judge Freer to allow the appeal on the basis of Article 8 is upheld.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him 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 Rebecca Chapman Date 28 February 2019

Deputy Upper Tribunal Judge Chapman

TO THE RESPONDENT
FEE AWARD

If a fee was payable in respect of the application, I make a fee award.

Signed Rebecca Chapman Date 28 February 2019

Deputy Upper Tribunal Judge Chapman