Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11969/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 August 2019	**On 3 September 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

GM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Litchfield, counsel instructed by Dotcom Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Blundell, promulgated on 2 May 2019. Permission to appeal was granted by PJM Hollingworth on 13 June 2019.

Anonymity

2. No such direction was made previously, however a direction is now made owing to the sensitive medical detail relating to the appellant's child.

Background

3. The appellant applied for asylum on 25 February 2015. That claim was refused and her appeals against that decision were exhausted by 9 January 2017. The appellant's son, E, was born in June 2015. On 28 April 2017, the appellant was granted discretionary leave to remain until 30 September 2017 because E required important medical treatment. The appellant applied for further leave to remain on 29 September 2017. It is the refusal of that application, by way of a decision dated 27 April 2018, which is the subject of this appeal.

4. The Secretary of State's decision letter explained that the circumstances which resulted in a grant of leave no longer prevailed because the child's condition had been stabilised and follow-up treatment was available in Albania. It was considered that the appellant did not qualify for leave to remain on any other basis. Considering Article 3, the respondent considered that E's medical problems posed no immediate danger to his health and his needs were generally maintained by the appellant in between specialist appointments. It was said that no exceptional circumstances had been raised and the respondent was not prepared to exercise his discretion in the appellant's favour.

The hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, the judge refused to adjourn the appeal to enable the Presenting Officer to submit the Med COI document relied upon by the respondent in the decision letter. The respondent submitted that relevant treatment was available for E in a private hospital in Tirana, whereas the appellant submitted that there would need to have been proper assurances about the transition of treatment from Great Ormond Street Hospital (GOSH) to another hospital in Albania. In addition, E suffered from social and learning difficulties.

6. The First-tier Tribunal found that E suffered from significantly impaired kidney function, urological problems, was due to have further surgery, was prescribed a raft of medication and his health was under regular review by the renal and urological teams at GOSH. While the judge refused to attach any weight to assertions made about the Med COI document in the decision letter, he did not accept that the state of E's health met the threshold for an Article 3 breach. Regarding Article 8, the judge rejected the submission that the appellant could satisfy paragraph 276ADE(1)(vi) of the Rules; he did not accept that E's best interests were to remain in the United Kingdom with his mother or that the appellant had something akin to a legitimate expectation that further leave would be granted. The Tribunal examined the respondent's Asylum Policy Instruction: Discretionary Leave version 7.0 August 2015 and concluded that it did not

state that DL should continue to be granted if the circumstances which prompted the first decision remained the same.

7. The judge found the public interest in the removal of the appellant and E outweighed their private lives.

The grounds of appeal

8. The grounds contended that the submission at the hearing was that if the circumstances which resulted in the previous grant of DL continued, the appellant would be entitled to a further grant. It was argued that the First-tier Tribunal failed to consider that E's recent admission to hospital and a letter from GOSH dated 19 March 2019 provided evidence that E's condition had not stabilised, further procedures were planned, and that the further treatment and long-term prognosis remained unclear. Therefore, it was said, that the appellant's circumstances were unchanged, she and E were entitled to a further grant of DL and this was determinative of the human rights appeal. It was also said that the judge erred in his assessment that the medical evidence did not amount to exceptional circumstances or raise a prima facie case of infringement of Article 3 because, E was a child. It was said that there had been recent complications, concerns over a raised plasma creatinine count, E's appointment was being brought forward and there was a need for a further review under anaesthetic so that all options could be considered. Furthermore, it was argued that the judge's consideration of E's best interests was flawed as it was based on speculation and it failed to take account of the evidence in the letter dated 19 March 2019. Lastly, the judge failed in his consideration of proportionality because if the appellants were entitled to DL there would be no public interest in their removal.

9. Permission to appeal was granted on the basis sought.

10. The respondent did not submit a Rule 24 response.

The hearing

11. Ms Litchfield relied on the grounds. In brief, she argued that the judge did not place due weight on the medical evidence showing that E's condition was still being reviewed, his health had not stabilised and that further procedures were planned. Furthermore, she contended that E's best interests were not adequately considered in circumstances where there was an absence of evidence to show that treatment was available in Albania. There was also no finding as to whether it was in E's best interests to remain in the United Kingdom to continue his treatment until his condition stabilised. Ms Litchfield also relied on the transfer of treatment point and the evidence that E's school provided him with medical assistance, neither of which had not been considered by the judge.

12. Ms Isherwood argued that it had never been argued that E's prognosis had not been clarified, the medical evidence was that he was receiving treatment. She argued that the respondent's policy on DL had not been provided to the Upper Tribunal and that this was the position at the First-tier Tribunal. Ms Isherwood contended that E's multiple medical conditions were identified and dealt with by the judge. In addition, the judge had considered the evidence from the school at [20].

13. Ms Isherwood was about to discuss Article 3, however Ms Litchfield indicated that this was not being pursued. With regard to E's best interests, Ms Isherwood read from paragraph 27 of the appellant's statement where she had referred to treatment being unaffordable in Albania rather than unavailable. She argued that the evidence before the judge, from Professor Buba, fell short of establishing that E could not receive treatment in Albania as a whole. Furthermore, the appellant's asylum claim had failed, and she would have support if she were to return to Albania.

14. Ms Isherwood referred to [31] of the decision, where the judge expressed that he did not understand the DL argument. She argued that the judge was correct to say that there was no legitimate expectation to a further grant of DL when the next review was in 6 months' time.

15. In reply, Ms Litchfield argued that there was ample evidence before the First-tier Tribunal to show that the prognosis was unclear and that there had been a number of medical problems which had come to light since DL was granted.

16. At the end of the hearing, I informed the parties that I was satisfied that the First-tier Tribunal made a material error of law in that the medical evidence was not fully considered and the judge's consideration of the child's best interests was similarly incomplete. I set aside the Judge's findings in relation to Article 8 and Discretionary Leave and give my reasons below.

Decision on error of law

17. The copy of the respondent's Discretionary Leave policy relied on by the appellant is dated 18 August 2015. The appellant and E were granted DL on 28 April 2017 and therefore there has been no change of policy between that grant and the application for a further grant of leave. The judge accepted the respondent's contention that E's medical condition had stabilised and that he was mainly being monitored by specialists. These findings do not adequately engage with the documentary evidence which postdates the grant of DL which repeatedly show that the prognosis remained unclear, that E had complex medical problems requiring specialist care and that a number of medical issues had since arisen. There is no indication in the medical evidence of a positive change in E's condition since DL was granted. The judge ought to have assessed whether a further grant ought to have been made on the same basis as

before, on the evidence before him, given that the respondent produced no evidence of treatment being available in Albania. If the appellant remained entitled to DL owing to E's medical condition, that would be determinative of the Article 8 claim.

18. The judge's conclusion that it was in E's best interests to accompany the appellant to Albania was similarly flawed given that there was no evidence before him showing that medical treatment was available in Albania as well as the evidence of the ongoing treatment which was required. The judge's best interest consideration does not assess the evidence from E's pre-school regarding the impact of his medical problems on his care. It is particularly notable that the staff have undergone training in changing his catheter and monitoring his temperature. E also has speech and language impairments. The judge did not include consideration of the need for E to change schools if removed to Albania.

19. Most importantly, the most recent letter from GOSH dated 19 March 2019 from Dr Peter Cuckow, Urology Fellow, describes the setbacks in E's care following recent surgery and speaks of plans to perform an examination of E's "*perineal urethrostomy and the bladder neck*" under anaesthetic and restarting intermittent catheterisation. The GOSH letter demonstrates that E's health has not stabilised and that further procedures are required, as follows;

> "*This young man has dysplastic kidneys and a duplex on the left hand side and clearly these are not functioning well, the bladder is quite abnormal and it may be hostile to the ongoing good function of his kidneys, which in any event is significantly impaired. We will have to keep a close eye on things and consider intervention if things to not stabilise or if there are any further infected episodes."*

20. I endorse Ms Litchfield's point that there had been no adequate assessment by the First-tier Tribunal of the lack of any arrangements made to transfer E's care to a hospital or hospitals in Albania.

21. The above-mentioned matters amount to material errors of law which render the decision of the First-tier Tribunal unsafe.

22. Ms Litchfield urged me to remit the matter to the First-tier Tribunal owing to the lack of an adequate consideration of E's best interests. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is the case that the appellant has yet to have an adequate consideration of her human rights appeal at the First-tier Tribunal and it would be unfair to deprive her of such consideration. Furthermore, Ms Isherwood advised me that the respondent had identified the missing evidence in relation to the availability of medical care in Albania and Ms Litchfield indicated that the appellant would be obtaining further evidence of E's condition. In these circumstances, I considered it inappropriate to retain the matter in the Upper Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside, save for the findings on Article 3.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of 3 hours by any judge

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 Date 25 October 2019

Upper Tribunal Judge Kamara