Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10911/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 September 2020	**On 10 September 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LUQMAN ONIKOSI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr. S Walker, Senior Presenting Officer
For the Respondent: Ms. R Chapman, Counsel, instructed by Wilson Solicitors

DECISION AND REASONS

1. The appellant is referred to as the Secretary of State in this decision and the respondent as the claimant.

2. This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Andonian ('the Judge') sent to the parties on 4 September 2019 by which the claimant's appeal on human rights (article 3 and 8) grounds was allowed.

3. Upper Tribunal Judge Pickup granted the Secretary of State permission to appeal on all grounds by a decision dated 7 February 2020.

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Hearing

4. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

5. The parties agreed that all relevant documents were before the Tribunal. The video and audio link were connected between the representatives and the Tribunal throughout the hearing. At the conclusion of the hearing both parties confirmed that the hearing had been completed fairly.

6. The claimant attended remotely and was supported by several friends who also attended the hearing remotely. All were reminded that the recording, videoing or taking of still pictures was not permitted without the permission of the Tribunal, which was not granted, and to undertake such act was a criminal offence.

Anonymity

7. The Judge did not issue an anonymity direction and no request for such direction was made before me.

Background

8. The claimant is a national of Nigeria and is aged 40. He entered the United Kingdom in 2007 with entry clearance and commenced studying for a university degree. In 2009 he began to feel unwell and was diagnosed with hepatitis B. Upon informing his family as to his condition two brothers underwent tests and were subsequently diagnosed with the same illness. Both brothers died of chronic liver disease and complications arising from hepatitis B in 2011 and 2012.

9. Consequent to the expiry of his leave to remain as a student in 2011 the claimant applied for leave to remain as a Tier 1 (Highly Skilled) Migrant, which was refused by the Secretary of State. The claimant then applied for leave to remain outside the Immigration Rules (‘the Rules’) on compassionate grounds and this too was refused. In 2013 he applied for leave to remain on the basis of private life rights which was refused by the Secretary of State in December 2013. Subsequent further representations were refused by the Secretary of State in April 2015 and certified as clearly unfounded.

10. The claimant made further representations on human rights grounds which were finally accepted by the Secretary of State to constitute a fresh claim under paragraph 353 of the Rules by decision dated 1 May 2018 and it is from this decision that the claimant enjoys a right of appeal.

Hearing before the FtT

11. The appeal came before the Judge at Taylor House on 23 August 2019. The claimant attended and gave evidence. The Secretary of State had been provided with 21 witness statements supporting the claimant and requested that five of the witnesses attend and be cross-examined. All five witnesses attended the hearing before the Judge and gave oral evidence. Over twenty friends attended the hearing to provide support to the claimant. The claimant further relied upon medical evidence from various medical practitioners, including two reports from Professor Katona, a consultant psychiatrist, and a report from a country expert, Ms. Adaobi Nkeokelonye, dated 9 June 2018.

12. By means of a detailed decision running to 128 paragraphs over 28 pages the Judge allowed the appeal on article 3 grounds and also on article 8 grounds both within and outside the Rules.

13. At paras. 107-108 the Judge concluded that the claimant would suffer mental health stigma upon his return consequent to his bipolar diagnosis that had led to several hospital admissions. Further, he found that there would be an absence of appropriate medical support in relation to hepatitis B treatment for the claimant upon return to Nigeria which would lead to him succumbing to chronic liver disease or to take his own life. The Judge concluded as to article 3:

> 108. … Thus, there is in my view having regard to the case of *Paposhvili* at paragraph 183, a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life-expectancy.'

14. The Judge concluded at para. 119 that there would be very significant obstacles to the claimant's integration in Nigeria in line with his conclusions as to article 3, and so his removal would be a disproportionate interference with his protected article 8 private life rights: paragraph 276ADE(1)(vi) of the Rules.

15. At para. 128 the Judge concluded that exceptional circumstances arose and so the claimant succeeded on article 8 grounds outside of the Rules.

Grounds of appeal

16. The essence of the Secretary of State's grounds are complaints that the Judge materially misdirected himself in considering the article 3 appeal

before him and further made such muddled findings when considering article 8 as to constitute a material error of law.

17. In granting permission to appeal UTJ Pickup succinctly identified the grounds advanced:

> '1. Whilst the medical evidence detailed previous suicidal ideation and attempts, the latest report, which was already three years out of date, stated that the appellant's mental state was stable. He continues to suffer from bipolar disorder and has recurrent thoughts of death, and suicide. Dr Katona's opinion in 2016 was that on return the risk of suicide would increase substantially. However, there was no up-to-date evidence that returning the appellant to Nigeria pose such a significant risk of suicide as to meet the high threshold required. It is also arguable that by applying *Paposhvili* the judge made a material misdirection. In the circumstances, it is arguable that the article 3 finding was flawed.
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> 2. It is also arguable that the article 8 assessment was flawed, failing to give any consideration of section 117B of the Nationality, Immigration and Asylum Act 2002 or the public interest. Neither is it made clear how the medical evidence impinged on article 8 rights.'

Decision on error of law

18. At the outset of the hearing Mr. Walker confirmed that the Secretary of State continued to rely upon the grounds of appeal. He further relied upon a short skeleton argument authored by Mr. T Melvin, Senior Presenting Officer, dated 27 May 2020.

19. Ms. Chapman confirmed her continuing reliance upon her rule 24 response, dated 9 March 2020. She further relied upon a skeleton argument, dated 2 September 2020, which Mr. Walker confirmed had been received by the Secretary of State.

Article 3

20. With his usual candour, Mr Walker accepted that the primary thrust of the Secretary of State's challenge to the Judge's article 3 decision was that he had applied the approach identified by the Grand Chamber in *Paposhvili v Belgium* (41738/10) [2017] Imm. A.R. 867 rather than that established by the House of Lords in *N v. Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 A.C. 296. He conceded that such argument fell away consequent to the recent Supreme Court judgment in *AM (Zimbabwe) v. Secretary of State for the Home Department* [2020] UKSC 17; [2020] 2 W.L.R. 1152 where the decision in *N* was departed from and the approach in *Paposhvili* confirmed, namely that cases raising an issue under article 3 may include 'situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving

country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'. This is the very approach adopted by the Judge in this matter who, as now confirmed by the Supreme Court in *AM (Zimbabwe)*, properly recognised that in cases of resistance to return by reference to ill health focus is to be upon the existence and accessibility of appropriate treatment in the receiving state. This element of the respondent's challenge now lacks merit post the Supreme Court judgment.

21. Mr. Walker further accepted, and again entirely appropriately, that the author of the grounds erred in asserting as a fact that the medical evidence before the Judge was of such age that the most recent report was three years old. Mr. Walker accepted that the Judge considered medical evidence that spanned several years up to and including 2018 and such evidence was consistent as to the claimant's health concerns, including risk of suicide. This element of the challenge enjoys no merits.

22. Two paragraphs of the grounds address the failure of the Judge to adequately bear in mind the fact that the claimant was able to function in Nigeria before he relocated to this country. This ground was not withdrawn by Mr. Walker, but it was not positively advanced. Mr. Walker was right to do so. It is abundantly clear that the significant deterioration in the claimant's physical health, and attendant impact upon his mental health, occurred in the United Kingdom and not in Nigeria. This challenge is misconceived and enjoys no merits.

23. The final challenge to the article 3 decision is an assertion that the Judge had made findings that medication for the appellant's 'various ailments' exist in Nigeria but are expensive, and so in finding the high threshold to have been met the Judge failed to engage with the Strasbourg judgment in *Bensaid v. United Kingdom* (44599/98) (2001) 33 E.H.R.R. 10 which addressed situations where medication was available, but expensive or requiring some distance to be travelled to secure. The Tribunal is not presently required to consider the application of *Bensaid* post *AM (Zimbabwe)* because the difficulty for the Secretary of State in relying upon the judgment in *Bensaid* in this matter is that the Judge expressly found at para. 100 that there was an absence in the entirety of Nigeria of scanning equipment that is required by the appellant in relation to his treatment, such absence being confirmed by Ms. Nkeokelonye. As acknowledged by Mr. Walker, upon examination of the findings made by the Judge, which are not challenged, the Secretary of State had difficulties in relying upon this element of her challenge to the article 3 decision. Again, Mr. Walker was correct to acknowledge that this challenge failed to engage with the actual findings of fact made. Rather, it was a challenge based upon a factual scenario the Secretary of State wished the Judge to have found, rather than the facts that were actually found and which she has not challenged on rationality grounds. This element of the article 3 challenge lacks any merits.

24. In the circumstances, the Secretary of State's challenge to the Judge's decision on the article 3 appeal is dismissed.

Article 8

25. The Secretary of State's challenge is, in parts, confused. There is a challenge to certain 'assumptions' made by the Judge at para. 96 of his decision, though upon consideration of this paragraph I am satisfied that the Judge is simply recording Ms. Nkeokelonye's evidence as detailed within her expert report. Further, much of the argument advanced is simply a disagreement with the Judge as to the conclusions drawn from the evidence, without more.

26. The difficulty for the Secretary of State in challenging the Judge's conclusion as to removal disproportionately interfering with the claimant's article 8 rights as considered under the Rules is that it is founded upon a flawed assertion that the appellant's medical concerns could not properly impact upon his private life. Paragraph 276(1)(vi) of the Rules confirms that an applicant will meet the requirements for leave to remain on the grounds of private life where 'there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK' and the real risk, on account of the absence of appropriate medical treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy can clearly establish very significant obstacles to integration upon return to Nigeria, as expressly found by the Judge. Given that the Judge lawfully allowed the appeal on article 3 grounds, it is axiomatic that the claimant would succeed under paragraph 276ADE(1)(vi).

27. As accepted by Ms. Chapman during her submissions, the Judge adopted an unfortunate approach in setting out his positive conclusion as to paragraph 276ADE(1)(vi) at para. 119 and then proceeding to explain his reasons over subsequent paragraphs. However. I am satisfied that such error is not material, as it is abundantly clear at para. 123 that his conclusions to there being very significant obstacles as to integration were formed upon consideration of his lawful article 3 assessment.

28. As for the consideration of article 8 outside of the Rules, I agree with Mr. Walker that it is a confused assessment as to exceptionality. The Judge has not adopted a structured approach as to the consideration of exceptionality, as recommended by Sir Ernest Ryder in *TZ (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1109; [2018] Imm. A.R. 1301. The consideration of article 8 outside the Rules is a proportionality evaluation involving a balance of public interest factors in which some factors are heavily weighted, the most obvious being the public policy in immigration control. Such balancing is non-existent at paras 125 to 128 of the Judge's decision. Rather, there is a listing of positive aspects in favour of the claimant to support the conclusion as to exceptionality. Such approach is erroneous in law. However, in the

circumstances I am satisfied that such error is not material because the article 3 conclusion, which concerns a non-derogable right, can only establish that it would not be in the public interest for the claimant to be returned to Nigeria as to do so would breach his protected article 8 rights.

29. The Secretary of State's challenge to the Judge's decision as to the article 8 appeal is therefore dismissed.

Notice of Decision

30. The decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

31. The decision of the First-tier Tribunal, dated 4 September 2019, is upheld and the Secretary of State's appeal is dismissed.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 7 September 2020

TO THE RESPONDENT
FEE AWARD

The appellant before the First-tier Tribunal has paid no fee and so there is no fee award.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 7 September 2020