Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01768/2020 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On Wednesday 18 August 2021	**On Monday 04 October 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER

Appellant

-and-

MR NELSON ESSIET MACAULEY

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr T Muman, Counsel instructed by Legal Rights Partnership

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Entry Clearance Officer. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Freer promulgated on 15 March 2021 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 30 December 2019 refusing his human rights claim. That claim was made in the context

of the Appellant's application for entry clearance as an adult dependent relative to join his sister, Mercy Warden, who is a British citizen. I refer to his sister hereafter as the Sponsor.

2. The Appellant and originally the Sponsor are nationals of Nigeria, but the Appellant has been living in The Gambia since 1995 and is now said to have permanent residence there. The Appellant suffers from visual impairment due to glaucoma and cataracts. He receives some treatment in The Gambia but, as I will come to, it is said that other treatment is not available in that country. It is said that the Appellant's eyesight continues to deteriorate. The Appellant is still able to carry out many daily tasks for himself but has the assistance also of his flatmate, John.

3. The Judge found that the Appellant was unable to meet the Immigration Rules ("the Rules") as an adult dependent relative ("ADR"). Nonetheless, he went on to consider the Article 8 claim outside the Rules and allowed the appeal on that basis.

4. The Respondent appeals the Decision for a number of reasons which are encompassed under the one heading of "failing to give adequate reasons for findings on a material matter". As I will come to, Ms Cunha in her oral submissions adopted and expanded to some extent on what is there said, grouping her criticisms of the Decision under two headings of findings on medical evidence/under the Rules and findings on the Article 8 claim based on errors in the assessment of the public interest.

5. Permission to appeal was granted by Upper Tribunal Judge Martin as a First-tier Tribunal Judge on 28 April 2021 in the following terms:

> "… 2. While I do not consider the ground that the Judge erred in dealing with the medical evidence to be strong, it is arguable that having found the appellant could not meet the dependant relative rule, the Judge erred in allowing the appeal under Article 8. It is arguable that the Judge erred in finding family life existed between the appellant and his UK sponsor when they had not seen each other for 23 years. Their relationship has continued by telephone and arguably would continue. Arguably the decision does not interfere with such family life as they have.
> 3. All the grounds may be argued."

6. There has been no Rule 24 response from the Appellant. Having heard from Mr Muman by way of oral submissions in response to the Respondent's case, I indicated that I found there to be an error of law in the Decision but that I would set out my reasons in writing. It was agreed that the appeal should be remitted for re-hearing by the First-tier Tribunal. As I come to, the Judge's reasoning on the various elements of the appeal is somewhat muddled, some relevant factors have been ignored and other largely irrelevant factors have been taken into account. The appeal will for that reason need to be re-determined entirely afresh with factual findings made on all elements. It is therefore appropriate to remit the appeal.

7. The hearing took place remotely via Microsoft Teams. There were no technical difficulties affecting the conduct of the hearing. I had before me a core bundle of documents including the Respondent's bundle, and the Appellant's bundle as before the First-tier Tribunal (running to 179 pages) (hereafter referred to as [AB/xx]).

DISCUSSION AND CONCLUSIONS

8. I deal with the grounds adopting Ms Cunha's division of them into the case within the ADR Rules and outside the Rules.

The ADR Rules and the Medical Evidence

9. I begin by noting that nowhere in the Decision does the Judge set out the ADR Rules (which are to be found at EC-DR of the Rules). That is not a necessity. However, it might have provided some structure to the part of the Decision dealing with the Rules. The Judge does make reference at [43] of the Decision to the Immigration Directorate Instructions ("IDIs") underpinning the Rules and accurately notes at that juncture that the questions for him to answer in this context were "the basis on which long term care must be required, the inability of the Appellant to receive care in their country and there is no person in that country who can reasonably provide that care". He went on to say that "[i]n detail, this means respectively that as a result of age, illness or disability, the applicant must require long term personal care to perform everyday tasks, for example washing, dressing and cooking."

10. As a result of his failure to refer to the ADR Rules themselves though, the Judge omits the reference to the need to show that care is not available in the country in which the applicant lives "even with the practical and financial help of the sponsor" because the treatment is not available or affordable. He also omits the requirement to show that the applicant can be "maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds".

11. I accept as Mr Muman pointed out, that the Judge resolved the issue under the ADR Rules at [50] of the Decision in the Respondent's favour stating as follows:

> "Under the Rules, I find that the Appellant has failed because they [sic] have not met in full the various requirements of the Rules, as explained with examples in the latest IDI. I find that the sponsor can maintain and accommodate the Appellant. His needs and the meeting of those needs in the Gambia are at the heart of the case under the Rules. I find that he does not match any successful example from those given in the IDI and that he matches most closely an unsuccessful example."

12. Nonetheless, the findings made in relation to the issue whether the Appellant met the ADR Rules were a necessary backdrop to the assessment of the Article 8 claim and the Respondent is therefore entitled to criticise

those findings also even though the issue was determined in her favour overall.

13. I therefore turn to consider the findings which were made. The main focus of the Respondent's criticism in this regard is the Judge's treatment of the medical evidence. As the Judge himself noted at [50] of the Decision the Appellant's treatment needs and the meeting of those needs was at the core of the case both within and outside the Rules.

14. I begin however with a summary of what the Judge says prior to his consideration of the medical evidence. He accepts at [45] of the Decision that there is no evidence that the Appellant does not have a required level of care in The Gambia. The Appellant lives with a flatmate who helps him with cooking and eating. It is not suggested that the flatmate is intending to leave or could not be replaced, if necessary, with care paid for by the Sponsor. The conclusion reached in this regard is that "it has not been shown that there is no person in the Appellant's country who can reasonably provide such care".

15. The Judge considers the potential maintenance and accommodation situation in the UK at [46] of the Decision. He there notes that the Sponsor would carry on working if the Appellant came to the UK. The Appellant is not said to need round the clock supervision. The Judge sets out at [41] of the Decision, the Sponsor's income and outgoings. He notes that her income is likely to reduce in the coming years as part of it is derived from child benefit and her youngest child will soon no longer be eligible. He accepts at [50] of the Decision that, nevertheless, the Sponsor could maintain and accommodate the Appellant. She sends financial remittances to the Appellant now and so that finding was open to the Judge. However, what the Judge fails there to deal with is the need for the Sponsor also to be able to fund care in the UK without recourse to public funds so that the Appellant would not become a drain on the health service in the UK. As I will come to, the Judge in fact finds that the Sponsor has not shown that she could afford private eye treatment in the UK.

16. I turn then to the medical evidence about treatment which the Appellant is receiving and needs and the availability of such treatment in The Gambia.

17. The Judge makes findings in this regard at [47] to [49] of the Decision as follows:

> "47. I have formed a very clear view that the medical help required to repair the damage to one eye is not available in The Gambia, at any cost. It is important not to confuse this fixed fact with the other criteria that lie within either the Rules or the relevant IDIs. Looking at the examples on p.14/34, there is an eyesight case where money is sent to the relative to pay for a carer to help daily with washing dressing and cooking meals. This example does not meet the criteria because the sponsor is able to arrange the required level of care.
> 48. I understand that family are the first port of call for daily care needs but the evidence shows that a person who is not related to the Appellant is willing and

> able to assist him. This does not sit well with any suggestion or inference that only relatives will help.
> 49. The core of the needs of this Appellant is for surgery to be performed on one eye, because a doctor has explained in writing that it would benefit the Appellant. I am not considering an application for a health visit visa, although it seems likely that a doctor at, for example, Moorfields Eye Hospital could provide, by performing surgery, long term practical help to improve if not wholly restore the vision of this Appellant. There is no evidence before me suggesting that the sponsor can or will pay for private eye treatment of the sponsor in the UK. It may be something that she can research. I take judicial notice that the cost is likely to be in the low thousands of pounds. Whether this is of any practical use, given that the travel restrictions due to the pandemic are continuing, I cannot say. What does not seem to be possible is for the Appellant to receive that surgery in The Gambia, a point on which we have evidence."

18. I begin by noting Mr Muman's acceptance that what is said at [49] of the Decision about potential treatment in the UK is largely speculative. There is no evidence about that. Mr Muman suggested this may be something within the Judge's personal knowledge, but the Judge does not say that. I accept that Moorfields is a specialist eye facility which is likely for that reason to be able to offer a wide range of eye treatments. However, there are two points of note in this regard. The first is the need for an explanation of the treatment the Appellant actually needs as that will define both the ability of The Gambia to meet the need and to inform the likely benefit of and need for the Appellant to come to the UK for such treatment (and I add to settle). The second is the cost of treatment and who is going to fund it. The Judge has failed to note the reference in the ADR Rules to the need for a sponsor to be able to fund treatment as well as to maintain and accommodate an applicant. That is relevant not only to the extent to which the Appellant can meet the ADR Rules but also to the public interest when one comes to the claim outside the Rules.

19. Remaining for now with the medical treatment aspect, however, I turn to the evidence which the Judge had which led to his findings at [47] of the Decision. That evidence is to be found at [AB/12] and [AB/178-179].

20. The first of those documents is written by Dr Olaniyah, a Consultant Ophthalmologist at the Sheikh Regional Eye Care Centre in Banjul. The letter is headed "Ministry of Health" with the address of the Eye Care Centre. It is a short letter dated 16 October 2019. It makes reference to the Eye Care Centre having treated the Appellant for the past four years. It sets out the history of treatment including, I note, "small incision cataract surgery" in 2017 (and therefore whilst the Appellant was in The Gambia). It also details the medications the Appellant is receiving. It refers to the readings from the eye tests on examination. It finishes with the following:

> "[The Appellant] has requested for a medical report for review by a Glaucoma and Cornea and anterior segment specialist to have surgical intervention OS (cataract surgery with posterior chamber intraocular lens and trabeculectomy) to improve his vision and quality of life."

I observe that the writer of this document does not say either that the specialist required to carry out that review could not be found in The Gambia nor that, if such surgery were recommended, the Appellant would need to go elsewhere for treatment.

21. It is not clear to me whether the second document dated 20 October 2020 is said to be the review or is simply another examination and conclusions. The letter is written by an ophthalmologist (not a consultant and not a person said to be a specialist), Dr Okoh. He again refers to the Appellant's history. He says that the Appellant suffers with "bilateral painless progressive loss of vision". The letter goes on to record the examination findings and treatment. The Appellant has received medical treatment for glaucoma. He is said to have shown "progressively decreasing vision in both eyes". His eye pressure was said to be "poorly controlled" but that is said to be due to his poor compliance with medication. The letter then says that he was "therefore right triple procedure, right cataract extraction, intraocular lens implantation and augmented trabulectomy". As I read that sentence, it indicates that the "surgical intervention" potentially suggested following review by the previous consultant had been performed in the Appellant's right eye previously. What is now recommended is "a possible triple procedure in the left eye".

22. Dr Okoh goes on to say this:

> "The overwhelming condition of the left eye cannot be handled here in the Gambia due to lack of facilities and the right not responding to medications as desired.
> Examination finding at presentation revealed severe irreversible visual loss of the left eye.
> He has undergone an operation in the right eye to lower his eye pressures but still he occasionally experience headache and visual disturbances.
> The difficulties visually impaired people experience in the Gambia is overwhelming. The person has no support but only the family members. Most African Government do not adequately cater for people with visual impairment. The majority of visual impaired patients are left to take care of their of own [sic] needs through begging in the streets and occasionally well to do family members give short term support.
> Nelson is not married and has no family relation in the Gambia, he is depending on the sister in the UK, she has been supporting greatly, since his visual impairment is causing a lot of difficulties to him and the family in Nigeria have no ability to support.
> The likely cost of medication and treatment cannot be estimated for reason being there is no such facility here.
> It is recommended that he seek further management to prevent his better eye from deterioration."

23. I can largely ignore the paragraphs dealing with family support as those were issues for the Judge to determine on the facts. The Judge found that the Appellant's daily care is provided by his flatmate. I observe however that it does appear from those paragraphs that the letter was written with a

view to supporting the Appellant's appeal rather than as a medical report as such.

24. That does not mean of course that weight cannot be placed on the report to the extent that it informed the Judge's findings. However, I make the following observations about this evidence which undermine the Judge's reliance placed on this report (and substantiate the Respondent's criticisms in that regard).

25. First, the report indicates that the Appellant has had an operation to his right eye of the same nature as that considered to be "a possible" treatment for his left eye. That begs the question why, if an operation of that nature were previously available in The Gambia it is no longer available.

26. Second, it appears however that Dr Okoh is advocating some other treatment, but he does not say what other treatment would assist. That is particularly notable when he says in the same breath that the loss of the left eye is "irreversible". I note also that the Appellant himself says in his statement dated 27 January 2021 at [AB/5-8] that he has already lost sight in his left eye "completely about a year ago".

27. Third, and finally, Dr Okoh does not say how he knows that the unidentified treatment is not available in The Gambia. It is difficult to see how he can say that there are no facilities to offer treatment without saying what is the treatment which is needed. If that is the "possible triple procedure" he does not say why that is not available when it was previously nor whether it would offer any benefit given his conclusion that loss of the left eye is "irreversible".

28. In light of that evidence, it is very difficult to see how the Judge has "formed a very clear view that the medical help required to repair the damage to one eye is not available in The Gambia, at any cost". Leaving aside the issue of availability, it is not even clear on the evidence what medical help is even suggested let alone required and what difference that would make to the Appellant's eyesight. At the very least, the Judge needed to explain why and how he reached that finding on the evidence. I have explained why I am unable to understand how it is reached when one looks at the detail of the evidence.

29. The Respondent has criticised also the Judge's reliance on this evidence as regards availability of treatment. The focus of her criticism relates to what treatment may be available in Nigeria but equally the report does not show how Dr Okoh's evidence could assist the Judge even as regards treatment in The Gambia. He does not set out his credentials or say what enquiries he has made.

30. Mr Muman appeared to accept that Dr Okoh could not be viewed as an expert in relation to medical treatment available in The Gambia. He directed my attention to the submission made by the Presenting Officer at

[16] of the Decision that there was no report from an expert. He accepted that to be the case. Nonetheless, he said that as Dr Okoh was practising at an Eye Care Centre within the Ministry of Health, he could be expected to know what treatment was available in The Gambia generally. That is like saying that any doctor or nurse working in one NHS hospital in the UK would know what treatments are on offer within the NHS throughout the UK. There is no evidence that Dr Okoh has researched the position or that he has any personal knowledge of the situation in other medical establishments.

31. In any event, as I come back to, and as the Respondent also says in her grounds, it is entirely unclear what treatment is being advocated in the first place. That is a necessary first step to establishing what is available. The Judge has failed to explain his findings in this regard particularly in light of the scant and slightly contradictory evidence. For that reason, the Respondent's grounds in this regard are made out.

Article 8 ECHR

32. Although the Judge's conclusion in relation to the position under the Rules was in the Respondent's favour, the error in his findings is capable of impacting on his assessment outside the Rules which was in the Appellant's favour. I therefore turn to examine how those findings have impacted in order to explain the materiality of the error as well as to consider the Respondent's challenge to the assessment itself.

33. As Judge Martin observed when granting permission to appeal, it is difficult to see how the Judge reaches his conclusion regarding the existence of family life at [55] of the Decision. I accept that the Sponsor makes regular financial remittances but there is scant evidence that I can see of the Appellant's dependency on those. He lives with a flatmate. It is not clear what are the financial arrangements between them for example as to the cost of accommodation and food. That flatmate provides the Appellant's daily care. It may well be as the Judge finds that the Sponsor speaks with the Appellant regularly to provide comfort and support. However, as the Sponsor's and Appellant's statements show they have not seen each other since 1997 (about twenty-four years). Their contact since has all been remotely. The Appellant says that his sister has been "very kind and supportive", but his flatmate has been "tremendously supportive". I accept of course that the Appellant is likely to derive the greater day to day support from the person physically present, but the Judge did need to explain how he reached the finding he did based on the evidence he had.

34. Second, and coming back to the medical evidence, it is not clear how the Judge reaches the finding at [57] of the Decision that the Appellant's situation "could be ameliorated by eye surgery". Still less can I see that there is any evidential support for or explanation by the Judge of his finding at [68] of the Decision that "[t]ime requires expedited eye surgery to be performed".

35. Third, I am not clear on what evidence the Judge bases his suggestion at [59] of the Decision that the Appellant may not be able to remain in Gambia. He may not have citizenship, but he has lived and worked there for about twenty-five years. He says in his application that he has permanent residence. Although the Appellant says in his statement that there is no support for those with disabilities in The Gambia, he does not say that he is not permitted to stay there even if he is unable to work. Similarly, although it is right to say that the Appellant does not have family ties in The Gambia, it is clear from his statement that he has friends there who have supported him in recent years.

36. Fourth, it is not entirely clear to me why the Judge found it necessary to embark on a consideration of the Sponsor's ability to move to The Gambia. It is perhaps just relevant to the issue whether family life could be continued there. However, the rather more relevant question is why family life (if the relationship is properly found as such) could not be continued remotely as it has been for many years with the Sponsor providing emotional and financial support as she has done by remote contact.

37. Fifth and most importantly, the Judge's assessment is flawed by the failure properly to recognise the public interest in this case. That is the criticism made by the Respondent and alluded to by Judge Martin when granting permission. As Mr Muman accepted, there is no recognition by the Judge of the importance of immigration control in light of the finding that the Appellant cannot meet the Rules. As I have already noted, the findings about the extent to which the Appellant might be able to meet the Rules are flawed by a failure to provide reasons based on the evidence. Even if those findings had been open to the Judge on the evidence, however, the Judge does not have any regard at [64] to [68] of the Decision to that factor. There is mention at [68] of section 117B (1) Nationality, Immigration and Asylum Act 2002 ("Section 117B") but no recognition of how that might be engaged in these circumstances.

38. Similarly, as the Respondent has pointed out, there is no proper consideration of the impact on resources of the Appellant's admission. At [65] of the Decision, the Judge says that "[t]here is no evidence [the Appellant] will have recourse to public funds during his stay". However, we are not here concerned with merely "a stay" but settlement. The finding there made is contradicted by the Judge's finding at [49] of the Decision that there was no evidence that the Sponsor could or would pay for private treatment, the inference being that the Appellant would need to obtain publicly funded treatment. I observe of course that the whole underpinning of the Judge's conclusion is that the Appellant needs to come here for that treatment. On a proper analysis of the findings, therefore, there would be a call on the public purse which is not taken into account. The Judge says that the Appellant would be able to work "particularly after eye surgery is performed". There is no medical or other evidence underpinning that finding and in any event that does not overcome the recourse to public funds involved in having such surgery in the first place.

39. Whilst, as I have already said, the Sponsor's ability to go to live in The Gambia might be tangentially relevant, it is not relevant to the extent of making the best interests of her minor child a "major factor". The real question was whether it was unjustifiably harsh to refuse to admit the Appellant or for him to continue his relationship with his sister and her children via remote means not whether it would be unjustifiably harsh for them to go to live in The Gambia. The Judge's finding at [66] of the Decision is particularly difficult to follow in that regard. The Sponsor clearly has a parental relationship with a minor child but there can be no question of requiring her or that child to leave the UK. The Sponsor is not a parent being removed. It is therefore difficult to see how Section 117B (6) could have any relevance whatsoever let alone a decisive one when conducting the balancing exercise.

40. In conclusion, the Judge's findings and assessment outside the Rules are flawed by the taking into account of irrelevant considerations, failures properly to take account of relevant factors, in particular as regards the public interest, and failure to explain the findings by reference to the evidence.

CONCLUSION

41. For the foregoing reasons, I conclude, as indicated at the hearing and the start of this decision, that there is an error of law disclosed in the Decision. I do not preserve any of the findings. I therefore set the Decision aside in its entirety. For the reasons set out at the hearing and at the start of this decision, it is appropriate for the appeal to be remitted to the First-tier Tribunal as all factual findings will need to be made afresh. The Appellant and the Sponsor may wish to consider the observations I have made above about the evidence with a view to providing better evidence on the next occasion in relation to the issues relevant to the Appellant's case.

DECISION

The Decision of First-tier Tribunal Judge Freer promulgated on 15 March 2021 involves the making of an error on a point of law. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Freer.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 20 August 2021