



IAC-FH-CK-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/15936/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
And via Skype  
On 5<sup>th</sup> January 2021**

**Decision & Reasons Promulgated  
On 28 January 2021**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**FELIX OLA-SUNMON  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the appellant: Mr A Osman, Counsel, instructed by Irvine Thanvi Natas  
Solicitors

For the respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 5th January 2021.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.
3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge P J Aujla (the 'FtT'), promulgated on 2<sup>nd</sup> December 2019, by which he dismissed the appellant's appeal against the respondent's refusal on 11<sup>th</sup> September 2019 of his human rights claim, specifically the right to respect for his private life, based on long residence in the UK and whether there were very significant obstacles to the appellant's integration in his country of origin, Nigeria; and his rights under Article 3 of the European Convention on Human Rights ('ECHR'), by virtue of various medical conditions, including chronic hepatitis B, liver cirrhosis and impairment, thrombocytopenia (low platelet account), hypertension and neuralgia.

### **The FtT's decision**

4. Given that the grant of permission is limited in scope, I focus only on those issues relevant to the grant. First, the FtT concluded, it is now accepted erroneously, at [14] that neither the appellant's application nor the grounds of appeal referred to Article 3 ECHR and therefore the FtT erred when concluding that it was not open to the appellant to argue the matter on Article 3 grounds.
5. Second, the FtT concluded, in the context of considering whether there were very significant obstacles to the appellant's integration into Nigeria, the appellant's medical conditions. At [30], the FtT concluded that Nigeria had a working medical system which the appellant could access and he had family who could support him to do so.
6. Having considered the evidence as a whole, the FtT dismissed the appellant's appeal.

### **The grounds of appeal and grant of permission**

7. The appellant lodged grounds of appeal which were lengthy. The FtT initially refused permission to appeal on 27<sup>th</sup> April 2020 but upon a renewed application, Upper Tribunal Judge Blundell granted limited permission on the following grounds:
  - 7.1. First, that it was arguable that the FtT had erred in refusing to hear arguments on Article 3 ECHR, when the representations referred to at [13], which accompanied the appellant's application for leave to remain clearly made reference to Article 3.
  - 7.2. Second, it was arguable that the FtT had failed to consider and analyse evidence that the appellant would be able to access medical treatment in Nigeria, before concluding that the appellant could work; and had erred in concluding that he could turn to his daughters for financial support. In particular, the FtT had failed to consider the evidence that the appellant was estranged from his daughters since he had separated from his wife (the daughters' mother) after 10

years of marriage. The FtT had also failed to take into account the appellant's uncontested evidence that his sister suffered a stroke rendering her wheelchair bound; and the appellant's brother-in-law was a pastor with a small church and therefore the FtT had failed to consider properly whether the appellant's sister and brother-in-law were in a financial position to be able to assist him with accessing treatment in Nigeria.

### The hearing before me

8. I first of all began the hearing by identifying the documents that had been before the FtT, which included a bundle which ran to some 92 pages, which included medical records at pages [48] to [74]. I also had excerpts from a Country Policy and Information Note, or 'CPIN', version 2.0 dated 28<sup>th</sup> August 2018; a report by EASO; and finally excerpts from NHS website printed out 25<sup>th</sup> November 2019 which dealt with potential complications around a number of conditions including hepatitis B, cirrhosis and hypertension. Without criticism of Mr Osman, those excerpts describe the conditions in general terms and although Mr Osman wished to refer me to a version of the NHS notes which talk about the consequences of the lack of treatment for the individual, and which I could read by searching for them on the internet, as he had not produced a copy before this Tribunal, I regarded it as appropriate that I should refer to the document that was in the bundle, evidently before the FtT, which in summary summarises the complications of hepatitis B, namely that people with hepatitis B can sometimes develop serious liver problems and these mostly affect people with an untreated long-term chronic infection.
9. I also had the benefit of reviewing the skeleton argument that ran to some ten pages which Mr Osman had also produced for the First-tier Judge and in particular a section on Article 3 at paragraphs 10 to 14 which dealt with the test under the well-known authority of Paposhvilli v Belgium (Application No. 41738/10). The skeleton argument dealt at [28] with the risk of breach of Article 3 where Mr Osman said:

*"It is submitted that the appellant would face a real risk of breach of his rights under Article 3 ECHR. The appellant is suffering from chronic hepatitis B, liver cirrhosis, chronic kidney disease and hypertension. He is currently taking a number of medications to assist in managing those conditions and in particular Entecavir. This is an anti-viral used to treat hepatitis B. Without adequate treatment of hepatitis B the appellant is at risk of his liver cirrhosis becoming more severe and therefore him suffering liver failure. It is also submitted that the appellant's chronic kidney disease could develop into kidney failure without adequate treatment of his hypertension."*

### Oral submissions

10. I was grateful for the focussed and relevant oral submissions by both representatives. Ms Everett accepted on behalf of the respondent that the FtT had failed to consider the Article 3 claim. The question was whether that error was material, which in turn them impacted on the second ground which was allowed to proceed, in particular the obstacles to the appellant's integration into his country of origin, Nigeria, principally because of his health conditions.

### **The appellant's submissions**

11. Mr Osman submitted that the question, noting that the FtT had failed to consider Article 3, was whether there was evidence before the FtT which was realistically capable of demonstrating that there were substantial grounds for believing that the appellant's removal would risk his rights under Article 3 being violated. The appellant need only show that the evidence was realistically capable of demonstrating such grounds, as otherwise I would be conflating the error of law with remaking the appeal. The extra test which was compatible with this was that both representatives accepted that it was correct to describe the threshold as an obligation on the applicant to raise a prima facie case of potential infringement of Article 3. While ideally there would have been more evidence before the FtT, Mr Osman had only been instructed to appear before the FtT at the last minute, and the evidence before the FtT was sufficient. Should an error of law be found, the appellant would seek to adduce additional evidence in any remaking.
12. In relation to the second ground that had been permitted to proceed, Mr Osman referred in particular to [24] and [25] of his skeleton argument and in particular, the misapprehension by the FtT that simply because the appellant could live with his sister and brother-in-law in Nigeria, they would be able to afford to support him with financial treatment. As found by the FtT at [23], financial support for the appellant by friends in the UK amounted to only £50 a week. That would not begin to finance the medical treatment for the appellant's conditions. The names of these conditions were listed in the appellant's medical records before the FtT, albeit Mr Osman accepted that the precise consequences and details of the extent of those conditions was not set out in the appellant's medical records. If I added the titles of those medical conditions to the general NHS guidance as to what the consequences could be of the absence of treatment, that at least passed the test of evidence before the FtT which was realistically capable of demonstrating a relevant risk.

### **The respondent's submission**

13. Ms Everett summarised her response that the first ground of challenge was too speculative. While the FtT had not considered the evidence from an Article 3 perspective, the evidence was not realistically capable of demonstrating relevant grounds. The evidence was, in reality, simply a list of the appellant's conditions, a list of prescribed drugs taken by the appellant and then assertions by Mr Osman of a plausible chain of events in the event of lack of treatment for those conditions. Taking one example raised by Mr Osman, it was said that if someone such as the appellant had impaired liver function or cirrhosis of the liver (liver scarring), such conditions, if they became severe, could then lead to liver failure and the need for a liver transplant or dialysis. The question here was that a simple list of conditions and a speculative, plausible chain of events was not sufficient evidence that was before the FtT, realistically capable of enabling him to reach the conclusion that there were substantial grounds for believing that Article 3 would be breached. It might be

that with additional evidence in the future, that the appellant could fill in the evidential gap but in this case, but not on the basis of the evidence as it stood before the FtT. The second ground of challenge was linked with the first, as it focussed on the appellant's ability to integrate into Nigerian society, if he were unable to afford medical treatment.

### **Discussion and conclusions**

14. I agree with both representatives' submissions that the FtT had erred in failing to consider the claim by reference to Article 3. As Ms Everett accepted, for the error not to be such that I should set aside the FtT's decision, I would have to be satisfied that there was simply not evidence before the FtT realistically capable of demonstrating that there were substantial grounds for believing that Article 3 would be breached. The appellant did not have to show that the FtT would inevitably have reached such a conclusion, or even that such a conclusion was likely.
15. In the circumstances of this particular case, and without belittling the potential seriousness of the conditions identified, what is striking, beyond the list of the conditions themselves, is the absence of specific medical evidence as to the seriousness or stage of such chronic conditions, which may have ranges of severity, in the evidence before the FtT, to which I have been referred.
16. As I had identified with Mr Osman, the bundles before the FtT contain on the one hand the appellant's medical record, which includes a list of medical conditions at page [47] (which for the sake of brevity I do not recite here) and a list of medications taken by the appellant. Immediately after the medical records is medical correspondence at page [51] in relation to an unrelated medical condition; and at pages [52] to [53], a further letter from the appellant's doctors describing the appellant as having to get up at night, to pass urine, which may be worth investigating, but that his renal function is "quite stable". There is an NHS discharge sheet at page [55] and two screening letters at pages [58] and [75] of the bundle.
17. While noting the print-out of web-pages from an NHS website, which were provided to the FtT, which identify possible consequences of medical conditions which the appellant is listed as having, Mr Osman was unable to draw my attention to any medical evidence before the FtT which was realistically capable of permitting the FtT to reach the conclusion that refusal of leave to remain would result in a relevant risk of breach of Article 3 ECHR, even accepted the wider scope of such a right in the light of the law as it is now understood since AM (Zimbabwe) v SSHD [2020] UKSC.
18. In summary, and whilst I reiterate my awareness of the serious effects that such conditions might have, within a broad range of such seriousness, I accept Ms Everett's submission that it was too much of a speculative leap, to proceed from a list of acknowledged conditions, and, in the basis of a general description of those conditions on an NHS website, for any FtT to realistically conclude that the appellant's removal would risk breaching his rights under Article 3 ECHR. By way of specific example, and as I discussed with Mr Osman and Ms Everett, impairment

of renal function can describe a whole range of symptoms and effects and in the absence of treatment, the consequences may be accordingly very varied.

19. It may well be that in making further submissions in the future, the appellant adduces more specific and detailed evidence and indeed it was telling that Mr Osman indicated that should I have found there to have been an error of law, there would have been a Rule 15(2A) to adduce more detailed evidence. While I make no criticism of the intention to make such an application, it is entirely consistent with the fact that there was simply insufficient evidence for the FtT to find in favour of the appellant in relation to Article 3.
20. That leads on to the question on the second ground, in relation to the analysis of very significant obstacles. Whilst Article 8 and Article 3 are very different tests, as Mr Osman accepted, there was no challenge to the fact that the appellant's sibling and brother-in-law, even if unable to fund access to treatment, would be willing to support him in other respects ([29]). The real thrust to the Article 8 challenge was the extent to which he would be able to receive medical treatment for his conditions. Just as there was insufficient evidence to satisfy the Article 3 appeal, I am similarly satisfied that there was similarly insufficient evidence as to the extent to which the appellant's conditions, even if untreated, would have on his ability to integrate into Nigeria. The challenge on Article 8 grounds also fails.

#### **Decision on error of law**

21. I conclude that while the FtT did err in law in respect of his failure to consider the Article 3 appeal, that error was not such that it is appropriate to set aside the FtT's decision. Therefore the appellant's challenge fails and the decision of the First-tier Tribunal shall stand.

#### **Notice of Decision**

**The decision of the First-tier Tribunal did not involve the making of an error on a point of law such that it is appropriate to set its decision aside.**

**The decision of the First-tier Tribunal stands.**

**No anonymity direction is made.**

Signed *J Keith*

Date: 18<sup>th</sup> January 2021

Upper Tribunal Judge Keith