Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10915/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2018	**On 19 March 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR OSASU OSASUYI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance and not represented
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me after a hearing on 23 June 2017 following which I decided that the decision of the First-tier Tribunal ("FtT") in relation to the appellant's appeal against a refusal of further leave to remain must be set aside for error of law.

2. The appeal was listed before me again on 29 September 2017 but the appellant did not appear. No explanation was offered by him and he was not legally represented. Giving him the benefit of the doubt, and erring on the side caution, I decided to adjourn the hearing. My reasons for having done so will be apparent from what

follows. In order to set out the context for this appeal, I reproduce the error of law decision, described as a Decision and Directions, in full as follows:

"1. The appellant is a citizen of Nigeria born in 1965. He is said to have arrived in the UK under a different name as a visitor on 21 September 1989.

2. In February 2013 he made an application for leave to remain which was refused with no right of appeal. Thereafter, in April 2014 he made the application for further leave which is the subject of the decision in this appeal.

3. On 1 May 2014 the respondent refused the application and the appellant's appeal against that decision came before a First-tier Tribunal Judge ("the FtJ") on 13 June 2016 following which the appeal was dismissed.

4. The appellant's appeal is based primarily on his medical condition, about which I shall refer in more detail below. He also relies on his length of residence in the UK.

5. In the grounds of appeal in relation to the FtJ's decision, it is argued, in summary, that the FtJ failed sufficiently to engage with the appellant's health condition, either in terms of Article 8 or Article 3. The appellant would be returning to Nigeria without any family support or without any means of earning a living. It is asserted that his condition is progressive and will ultimately be fatal. His return to Nigeria would accentuate the degree of physical and mental suffering that he would experience prior to the inevitable conclusion of the disease, such that it would breach both Articles 3 and 8. Various authorities in relation to Article 3 are referred to in the grounds. Reference is also made to what is described as the palliative care that he requires.

6. The renewed grounds, after permission was initially refused, contend that it was argued before the FtJ that his removal to Nigeria would separate him from his support network in the UK, and the FtJ had failed to consider the issue of the appellant's physical and moral integrity and his ability to meet his death in a dignified manner.

7. It is further contended that the FtJ "wholly ignored" the arguments put forward and instead relied on the concession that the appellant's death was not expected immediately and could not therefore meet the Article 3 threshold, thus disregarding the argument made under Article 8. The additional grounds also make reference to the decision in *Paposhvili v Belgium* [2016] ECHR 1113 (which was handed down after the FtJ's decision was promulgated).

Submissions

8. Mr Wells submitted that the argument before the FtJ was advanced purely on medical grounds under both Articles 3 and 8, in terms of the appellant's physical and moral integrity. He suggested that there was perhaps a misunderstanding on the part of the FtJ in terms of Article 3 not being relied on. In any event, the FtJ's consideration of Article 8 outside the Rules was wholly inadequate.

9. The appellant's condition is a deteriorating one. There was only very brief consideration of his medical condition and of the very serious and grave

difficulties that he faced on return to Nigeria. The FtJ was wrong to conclude that the appellant would be able to find an occupation on return there. There was similarly no consideration of the issue of a lack of family ties there. There was evidence of support from friends in the UK helping him with cooking and shopping.

10. Mr Melvin submitted that it is clear that Article 3 was conceded before the FtJ. Furthermore, it was very difficult to succeed under Article 8 if the Article 3 claim could not succeed. It was not suggested in the appellant's grounds that he could succeed under the Article 8 Rules. He was unable to show very significant obstacles to integration. He was not receiving much by way of medical care.

11. In reply, Mr Wells submitted that if the decision in Paposhvili was available at the time of the hearing, Article 3 would not have been conceded. At the time the threshold was as set out in *N v Secretary of State for the Home Department* [2005] UKHL 31 and N v United Kingdom [2008] 47 EHRR 39.

Conclusions

12. Notwithstanding that it was suggested that the FtJ had failed to take into account arguments advanced on behalf of the appellant, nothing was provided to me on behalf of the appellant in terms of what arguments were actually advanced. For example, Mr Wells' own notes of the hearing were apparently not available, and it appears that no effort had been made to obtain an agreed note of any arguments or submissions advanced before the FtJ. That is plainly unsatisfactory.

13. Mr Melvin was able to provide a typed minute in relation to the proceedings prepared by the Presenting Officer who appeared. However, that note is not of particular assistance in terms of what was advanced before the FtJ. That is unsurprising in a sense, since it was the appellant's case, not the respondent's, that arguments advanced were not considered by the FtJ.

14. Furthermore, the FtJ's decision makes it clear that it was accepted on behalf of the appellant that he was not able to succeed under Article 3. However, it was suggested before me that this was perhaps based on a misunderstanding by the FtJ. Again, in that respect it would have been helpful if any notes of the hearing prepared by Mr Wells had been provided. In any event, the submissions on behalf of the appellant before me were obviously inconsistent in terms of whether or not it had been accepted that the Article 3 claim could not succeed.

15. Although the grounds in support of the appeal before the Upper Tribunal refer to the issue of physical and moral integrity under Article 8, no such argument is reflected in the FtJ's decision. Again, the absence of any note from the advocate, or any agreed note, hampers the assessment of the merit of that contention. Likewise, in terms of what is suggested as to the FtJ's failure to take into account submissions in relation to separation of the appellant from his support network in the UK.

16. It seems to me to be essential that if grounds are advanced on the basis of a failure on the part of an FtJ to take into account submissions, or indeed

evidence, advanced at the hearing before the FtJ, such a contention needs to be made good with reference to any notes of the hearing prepared by the advocate, preferably supported by a witness statement. Efforts should be made to obtain the respondent's agreement as to what was or was not argued or conceded before the FtJ, in advance of the hearing before the Upper Tribunal. Otherwise, the scenario of the Upper Tribunal Judge having to have resort to the FtJ's (usually) manuscript record of proceedings arises.

17. That is unsatisfactory for three immediately obvious reasons. In the first place, whilst the FtJ can be expected to have made a note of the main submissions, it will not always be the case that everything that was said in submissions would be recorded. Secondly, it may not even be possible to read what the FtJ has written in manuscript. Thirdly, seeking to establish what was advanced in submissions with reference to the FtJ's record of proceedings is not a process that should be undertaken during the hearing before the Upper Tribunal, with the Upper Tribunal Judge either reading out or showing the parties the FtJ's notes. That sort of 'on the hoof' consideration of what may be a significant issue is plainly undesirable.

18. In this case, the FtJ concluded that the appellant was not able to succeed under the Article 8 Rules with reference to paragraph 276ADE, stating that the appellant did not claim to come within any aspect of the Rules. He concluded in particular, that the appellant had failed to show that "even with his condition" he would face very significant obstacles to integration in Nigeria. He went on to state that there was no evidence that the healthcare system available in Nigeria, coupled with his resources and friends' evident generosity, would leave him "so bereft of ability to occupy himself that he would suffer at a level envisaged by engagement and breach of article 2 and 3". He concluded that his condition did not prevent a private or family life.

19. When considering Article 8 more widely, he concluded that all the appellant's circumstances are "covered by the Rules". In the alternative, he found that the appellant did have a private life by reason of being able to live in the UK for a time, but he had not been in the UK continuously since his arrival, the evidence not supporting that contention. He concluded that the appellant had not been truthful on where he has spent all his time, referring to some of the documentary evidence that he had before him in this context.

20. Apparently in that same context, although it is not entirely clear, the FtJ then said as follows at [10]:

> "Medical records only go so far and the medical profession are not here as policemen for the funds of the NHS and so did not know in reality if someone is here lawfully or not when administering or delivering care. The point that they should do so according to their contract terms and the laws governing such care is redundant in the face of actual practice in the NHS."

21. At [12] he found that the appellant's removal "would plainly" amount to a breach of his private life. In the following paragraph, referring to the balancing exercise that he had to undertake, he said that the respondent

had established on a balance of probabilities that the decision was proportionate taking into account all factors relied on by the parties.

22. At [14] he said as follows:

> "The appellant relied on a series of unfortunate circumstances as somehow providing him with a legal claim on the basis of compassionate circumstances. The lack of criminal convictions and not being a burden on the State are matters which I would have thought any decent person in a foreign country would endeavour to achieve. They do not provide a case for him remaining in the UK."

23. Finally, he said at [15] that:

> "The respondent has the sometimes onerous and to some unpopular but respected duty of upholding the law in terms of immigration. The economic wellbeing of the UK and the enforcement of law depend in part upon it. I find that the rule of law and economic wellbeing is however not so firmly in favour of not [sic] allowing the appellant to remain. The respondents [sic] have been able to establish that in this particular case their decision has been proportionate and therefore I find it lawful in their refusal."

24. Whilst it is evident that the FtJ recognised that the appellant's health was the foremost argument in support of the appeal, that seems to me to make it all the more striking that there is no reference whatever to any particular feature of the medical evidence. There is no assessment of it in terms of the nature or seriousness of the appellant's condition. There is no appraisal of the extent to which the appellant is reliant on assistance in the UK from friends. There is no apparent consideration of how his health would affect him on return to Nigeria in terms of the progression of his illness.

25. It also seems to me that the lack of any reference to the specifics of the medical evidence, combined with some of the phraseology used by the FtJ, gives the impression of some cynicism in the FtJ's approach. It is not that the FtJ should be expected to express sympathy for the appellant, and the decision of a judge must plainly be based on the evidence within a sound appreciation of the relevant legal framework. However, if a lawful assessment of the merits of an appeal in an Article 3 or Article 8 case on medical grounds is to be made, some recognition of the appellant's situation in terms of his health should be evident.

26. In the appellant's bundle before the FtJ there was medical evidence specific to him extending over about 25 pages. The following is a summary of some of it. In a report from the Department of Neurogenetics at University College London Hospitals, dated 6 January 2015 by Professor Wood, a Professor of Clinical Neurology and Neurogenetics, it states that the appellant was referred to the hospital by his GP in August 2014. The report refers to a diagnosis of autosomal dominant cerebellar ataxia. The additional features, for example the neuropathy, are said to put his case in the "complicated group". It then states as follows:

> "Unfortunately these forms of ataxia are progressive, disabling and incurable. There are in fact no disease modifying treatments and the prognosis is one of relentless decline...

> As the examination summary above reveals, he is very severely disabled and I am afraid there is no prospect of any substantial improvements. In fact his swallowing function will continue to deteriorate and his limbs will become slowly but steadily more ataxic. Supportive therapies such as physiotherapy, speech and language therapy are attempted to help mitigate some of the symptomatology but do not alter the natural history or course of the disease.
>
> In addition, as has been witnessed in other family members, this is a disease of the severity that shortens lifespan and I am afraid to say that it is very likely indeed that this man's life expectancy will be severely reduced as a result of his ataxia. It is very difficult to be precise about the exact course of the disease but one would anticipate that within the next 4-5 years he will become wheelchair-bound absolutely and then survival is really dependant on additional concommital illnesses such as pneumonias."

27. A further medical report from the same hospital and department, dated 30 December 2015 states that the appellant was seen on that day, having attended in a wheelchair. He reported that he had been using the wheelchair regularly for the past year. Indoor, he used a frame but said that he found it very difficult to mobilise. To summarise, under the sub-heading "Impression" it states that the appellant was "clearly experiencing worsening symptoms in terms of his mobility, swallowing and speech together with a polyneuropathy".

28. Finally, in a report dated 15 January 2016 from Professor Wood, it states that in the last year the appellant had had worsening balance and limb coordination, resulting in several falls. He reported having difficulty swallowing and frequent episodes of regurgitation and choking. His speech was reported as being worse and more difficult to understand. Professor Wood stated that those are compatible with the known diagnosis and the underlying cause. At the time of the examination the appellant was said to have a very ataxic gait and was very unsteady. The report states that the overall impression was that he was clearly experiencing worsening symptoms as regards mobility, swallowing and speech.

29. The FtJ's decision does not identify the appellant's condition; does not describe it; and does not refer to even one of the several medical reports put before him.

30. As far as can be deduced from the record of proceedings made by the FtJ, submissions were made in terms of the appellant's condition being a deteriorating one, his being wheelchair-bound, and with reference being made to the manner of his death and the inevitability of it as a result of his condition.

31. There is merit in the submission made on behalf of the respondent before me in terms of the difficulty in succeeding in an Article 8 health case where the Article 3 threshold is not met. Furthermore, the arguments advanced on behalf of the appellant before me, both in submissions and in the written grounds, suffer from the deficiencies to which I have referred. Nevertheless, I am satisfied that the FtJ erred in law in his assessment of the

appeal under Article 8 because of the evident lack of engagement with the medical evidence.

32. That is so, even accepting the Article 3/Article 8 interaction in terms of health cases. There is no reference by the FtJ to the issue of physical and moral integrity, which it seems to me is an obvious matter to have been considered in an Article 8 case of this nature. The proportionality assessment was manifestly lacking.

33. Accordingly, the FtJ's decision must be set aside. I do not consider that it is appropriate for this appeal to be remitted to the First-tier Tribunal having regard to the Senior President's Practice Statement at paragraph 7.2. Such a course was not suggested on behalf of the appellant; indeed the contrary was suggested.

34. The only findings of fact that can be preserved, which are not infected by the error of law, relate to the FtJ's conclusions at [10] in terms of the appellant's continuous residence in the UK since 1989.

35. In the light of the decision in *Paposhvili*, the re-hearing will have to include a reappraisal of the case with reference to Article 3.

36. The appellant's representatives in particular, are to have careful regard to the directions set out below.

DIRECTIONS

1. No later than 7 days before the next date of hearing, the appellant is to file and serve up-to-date medical evidence, which must include an assessment of prognosis and life expectancy.

2. In relation to any additional further evidence relied on, such evidence must be filed and served no later than 7 days before the next date of hearing.

3. In relation to any witness whom it is proposed to give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief, such that there will be no need for any examination-in-chief beyond the adopting of any witness statement.

4. The appellant is to file and serve a skeleton argument setting out precisely the basis upon which the appeal is advanced, and including specific reference to any background material relied on."

3. In the Further Directions dated 29 September 2017, in respect of the adjourned hearing I said as follows:

> "Today's hearing on 29 September 2017 was adjourned because the appellant did not attend. His solicitors have written to the Tribunal stating that they have not been able to contact him, and asking to come off the record. It appears that the appellant has had notice of the hearing. To my knowledge, he has not contacted the Tribunal to say that he was unable to attend.
>
> However, as is clear from my Decision and Directions, the appellant has a serious medical condition that is progressive and deteriorating. For the moment, I cannot rule out the possibility that his condition has prevented him from attending or giving instructions. Hence, I have adjourned the hearing. I make the directions

below, taking into account that the appellant is no longer represented, but also catering for the possibility that he may make contact with his former solicitors who may then continue to represent him.

1. No later than 7 days before the next date of hearing, the appellant is to file and serve an up-to-date medical report, which must include a prognosis.

2. If the appellant's former representatives again become instructed to represent the appellant, the directions included in the Decision and Directions must be complied with (and which will supersede direction 1. above)."

4. As is apparent from those further directions I was concerned that in the light of the appellant's serious medical condition there was some reason as to why he was unable to attend the hearing and unable to communicate his inability to attend.

5. However, in relation to the hearing before me on 18 January 2018, the re-listed hearing, I decided that the time had come to proceed with the appeal notwithstanding the appellant's non-appearance. I was satisfied that he had been given notice of the time and place of the hearing and that there was no satisfactory explanation for his absence. I did not consider that it was appropriate to speculate in terms of his health as to why he had not appeared, although of course I sincerely hope that it is not his condition which has prevented his attendance. There was no explanation from him and there had been no explanation from him or contact with the Tribunal after the hearing was adjourned on the last occasion and after he had received my Further Directions. In the circumstances, I proceed to re-make the decision on the basis of the information presently before me.

6. Given that I have set out in its entirety the error of law decision which fully explains the background to the appeal and the appellant's circumstances, no further context needs to be provided.

Submissions

7. Mr Bramble relied on the decision in *EA & Ors (Article 3 medical cases – Paposhvili not applicable)* [2017] UKUT 00445 (IAC), submitting that the threshold for the assessment of an Article 3 case remains that as set out in *N v Secretary of State for the Home Department* [2005] 2 AC 296 and *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40.

8. Although there was an issue under Article 8 in terms of the appellant's physical and moral integrity, it was for the appellant to establish his case.

9. I was referred to some aspects of the evidence in the appellant's bundle in terms of relationships or support in the UK and his ability to be able to fund treatment should he be returned to Nigeria. It was submitted that the evidence in various respects was conflicting.

10. It was further submitted that the respondent's decision sets out background material indicating that there is treatment available in Nigeria for the appellant's conditions.

11. It was argued that the appellant's circumstances do not meet the high threshold required for an Article 3 case to succeed and similarly in terms of his health in relation to Article 8.

12. So far as private life under the Rules is concerned, the evidence did not establish that he had been in the UK for the requisite period of twenty years. He had been in the UK unlawfully for the duration of the time that he has been here, which is a factor which would weigh against him in the proportionality assessment outside the Rules.

13. The evidence did not establish any firm ties to the UK. Even if the appellant was unable to attend the hearing, there was no evidence from any other witness in support of his appeal.

Assessment

14. The European Court of Human Rights in *Paposhvili v Belgium*, 13 December 2016, ECtHR (Application No. 41738/10) modifies the approach to be taken to Article 3 health cases. However, it is clear from *EA & Ors* that the ECtHR departed from the clear and consistent case law that it identified in its own decision in stating at [181] that:

> "The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N. v. the United Kingdom*, has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision."

15. It was decided in *EA & Ors* that the decision in *Paposhvili* is not consistent with United Kingdom case law. The Tribunal concluded at [31] that it was not permissible for the Tribunal to depart from the domestic authorities it cited. Thus, in that paragraph, the Tribunal said that:

> "It is not permissible for the Tribunal to depart from this authority and, in particular, cannot do so by reliance upon the *Paposhvili* enlargement set out in paragraph 183 of the ECtHR's judgment (see paragraph 6 above). Hence, the recasting of Article 3 to 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*' is not part of United Kingdom domestic law."

16. Having considered the decision in *EA & Ors* with care, I agree with its reasoning and adopt it (and now see also the decision of the Court of Appeal in *AM (Zimbabwe) & Anor v The Secretary of State for the Home Department* [2018] EWCA Civ 64).

17. It is not necessary for me to do other than refer to my summary of the medical evidence set out in the error of law decision at [26]-[28]. The appellant's condition is progressive, disabling and incurable and the prognosis is one of relentless decline.

He is very severely disabled and there is no prospect of any substantial improvements.

18. I do not say that there may not come a time when the appellant's condition reaches the point where it can justifiably be said that his case meets the very high Article 3 threshold. However, assessing that aspect of the appeal on the basis of the evidence before me, there being no further evidence beyond that to which I have referred, I am not satisfied that the appellant has established that the respondent's decision amounts to a breach of his rights under Article 3.

19. So far as Article 8 is concerned, I consider the matter first with reference to the relevant Immigration Rules. Under para 276ADE(1), aside from the suitability requirements of the Rules and the need to have made a valid application, the appellant needs to establish under para 276ADE(1)(iii) that he has lived continuously in the UK for at least twenty years (discounting any period of imprisonment). He has not been subject to any period of imprisonment, indeed no criminal offences are recorded against him. However, as I indicated in the error of law decision, the FtJ found at [10] that the appellant had not established continuous residence in the UK since 1989. That is a finding that, as I also indicated, can be preserved, it not having been infected by the error of law. The evidence before the FtJ did not establish continuous residence since 1989.

20. The appellant would then only be able to establish that he meets the requirements of para 276ADE if he can establish under subpara (vi) that he has lived continuously in the UK for less than twenty years, but there would be very significant obstacles to his integration into Nigeria. In this context I bear in mind the length of time that the appellant has been in the UK, but he came here as an adult, aged about 24 years. He has been in the UK, even if not continuously, since 1989, about 28 years. However, that alone does not establish that he would have very significant obstacles to integrating in his home country, where he spent his youth and formative years.

21. In addition, regardless of his illness and whatever private life he has established in the UK, in his witness statement at [2] he states that his father is still alive in Nigeria, albeit that he does not have contact with him. He does not suggest that there is any reason as to why he could not re-establish contact with him, or indeed with any other relatives, even if distant ones, on his return. However, the question of integration does not actually depend on his having relatives there in any event.

22. I am not satisfied that the evidence establishes that there would be very significant obstacles to the appellant's integration in Nigeria.

23. It is however, necessary on the facts of this appeal to consider Article 8 outside the confines of the Article 8 Rules. There are compelling circumstances which plainly require such an assessment.

24. S.117A-B of the 2002 Act provides as follows:

"**117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

25. The appellant has a private life in the UK, inevitably given the length of time that he has been here and what is indicated in the evidence in terms of the treatment he has been receiving, apart from anything else. The respondent's decision would amount to an interference with that private life, and that interference will have consequences of such gravity as potentially to engage the operation of Article 8. The decision is in accordance with the law and pursues a legitimate aim, namely the maintenance of effective immigration control which is a feature of the economic wellbeing of the country.

26. The appellant has been in the UK without leave since his arrival, or at least since the expiry of the leave to enter granted to him as a result of the entry clearance as a visitor. The decision letter states that he was subject to criminal proceedings in relation to his entry using a passport in another name, although also states that there is no information in relation to whether there was any conviction. There are clearly public interest considerations at play in terms of the maintenance of effective immigration control being in the public interest. The evidence as to the appellant's financial independence is uncertain for reasons given below. However, it is the case that little weight can be attached to his private life established when he is in the UK unlawfully, as provided for in s.117B(4). The appellant can plainly speak English but he can obtain no positive advantage from that fact (see *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC).

27. His serious, progressive and incurable illness is plainly a factor to be considered. Some limited information in relation to treatment available in Nigeria is referred to in the respondent's decision at [24]-[25]. The appellant has not adduced any evidence which indicates that treatment is not available for him. In any event, without up-to-date medical evidence, which it is the appellant's responsibility to provide, it is difficult to see how he can establish that he would not have access to treatment in Nigeria. The medications he is receiving, or was at the time of the respondent's decision, do appear to be available, and he is able to access physiotherapy on his return. The respondent's decision refers to the Nigeria – Medical Issues Bulletin produced by the Home Office.

28. At page 14 of the appellant's bundle that was before the FtJ, there is a letter from AXA PPP Healthcare, dated 15 January 2016, referring to the appellant having private healthcare. That is some evidence to suggest that the appellant has some means, although there is very little other evidence of what his means are. It is highly unlikely that he is in employment, but nevertheless, it does appear that he has private medical insurance. On that basis, there is some reason at least to believe that he has means to pay for treatment on return to Nigeria should he need to.

29. The appellant's witness statement refers to various family members being deceased, referring to them as having suffered from the same condition as he does. He refers to being wheelchair bound which would make it difficult for him to obtain employment in Nigeria, and he states that his life would become very difficult as a result of his ill-health. That much is probably indisputable.

30. He refers to two friends in the UK, the Rev Divine Josephs-Ayela and Olukayode Belo-Osagie, and both have provided statements. Those statements are dated 2 February 2016 and 28 January 2016, respectively. The former states that he has known the appellant since childhood and that he is a personal friend of his. He states that as an ordained evangelical minister he has endeavoured to assist the appellant by supplying him with day-to-day items, groceries, toiletries and the like. He also states that he has provided support in the form of prayers and counselling. Mr Olukayode Belo-Osagie stated he has known the appellant for over 35 years. He states that he has visited him as often as he can and refers to the appellant's illness and his previous good health. Mr Bramble did raise the question about how the Reverend Divine could be said to have known the appellant since childhood, when the appellant only arrived in the UK in 1989 and the Rev Divine was born in Moseley in 1966. However, the appellant's witness statement says that Reverend Divine was born in the UK but spent his childhood in Nigeria.

31. I accept therefore, that the appellant has some limited private life in the UK in terms of his relationship with those friends, and, of course, in terms of the medical treatment he has been receiving and the support inevitably provided by those caring for him. However, that private life is not such as to mean that the respondent's decision requiring him to return to Nigeria, he having no lawful basis of stay in the UK, is a disproportionate interference with his private life.

32. As indicated in the decision in *GS (India)*, it is rare for an Article 8 case to succeed where it cannot succeed on Article 3 grounds. The same considerations apply in terms of the appellant's physical and moral integrity as they do in relation to Article 3. For example, he would be able to obtain treatment on return to Nigeria, and the evidence does not establish that he could not re-establish contact with his father, or indeed in fact any other more distant relatives or people known to him or associated with his family.

33. The appellant's circumstances in terms of his health inevitably attract a considerable degree of sympathy. However, on the basis of the evidence adduced by the appellant in support of his appeal it is impossible to conclude that the respondent's decision to refuse leave to remain amounts to a breach of Article 3 or Article 8. In terms of Article 8, I am satisfied that the respondent has established that the decision is a proportionate response to the legitimate aim pursued.

34. In those circumstances, this appeal must be dismissed.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, the decision is re-made dismissing the appeal under Articles 3 and 8 of the ECHR.

Upper Tribunal Judge Kopieczek 15/03/18