Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15528/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 April 2014	**On 30 May 2014**
Oral determination given following the hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

P F

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant (the Secretary of State): Mr G Saunders, Home Office Presenting Officer
For the Respondent (P F): Ms J Norman, instructed by Immigration Advice Service

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Adio promulgated on 21 February 2014 following a hearing at Hatton Cross on 3 February 2014. For ease of reference I shall throughout this determination refer to the Secretary of State who was the original respondent as “the Secretary of State” and to P F, who was the original appellant, as “the claimant”.

2. The claimant is a national of Cameroon who was born on 15 January 1988. She first arrived in the United Kingdom on 29 June 2011 as a Tier 4 Student with appropriate permission. She applied, while here lawfully, for leave to remain in the UK on 26 February 2013, which application was refused on 30 April 2013. The Secretary of State also made a decision to remove the claimant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The chronology of the claimant’s immigration history is set out helpfully at page 2 of the skeleton argument prepared on her behalf for this hearing. While in this country, very shortly after arrival, she married one K L, a British citizen, and the following month she applied to change her immigration status and for a grant of leave to remain as a spouse. However, on 12 September 2012 she was diagnosed as being HIV positive and after this diagnosis her marriage broke down and she returned to live with her sister, S, who is resident in this country. She is still married to K L but it is not a subsisting marriage. Thereafter on 15 October 2012 she started on what is said within the skeleton argument to be “first line anti-viral drugs” prescribed by Dr Helen Mullin, and it is said on her behalf that by 29 October 2012 these drugs had caused severe side effects such that she was unable to continue with this medication. She was then started on a different course of medication which it was argued on her behalf was not available in Cameroon.

4. Throughout this period she was continuing her MBA course which she completed on 30 October 2012. Thereafter, in January 2013, the claimant withdrew her application to remain as a spouse, because she acknowledged that the marriage was not subsisting, but applied the following month for leave to remain on the basis of her rights under Articles 3 and 8 of the ECHR.

5. The application was refused by the Secretary of State on 30 April 2013, as noted above, and the claimant appealed against this decision which appeal came before Judge Adio sitting at Hatton Cross on 3 February 2014. As already noted, in a determination promulgated on 21 February 2013, Judge Adio allowed the appeal. He allowed it under both Article 3 and Article 8. The Secretary of State now appeals against this decision pursuant to permission granted by First-tier Tribunal Judge Astle on 10 March 2014.

6. I shall summarise the basis upon which Judge Adio allowed the appeal as set out in his determination. He recorded the evidence which had been put before him and in particular at paragraph 6 that the claimant had not had

any contact with her husband recently and that that marriage was at an end. She said she had a brother and sister in Cameroon.

7. The claimant told the Tribunal that her family in Cameroon did not know about her HIV status and that they would probably blame her but that her sister in the UK was supportive. Her sister had lived in the UK for a long time "and her mentality about certain things has changed" (paragraph 6).

8. At paragraph 7 the judge records that the claimant had said that she had been diagnosed in September 2012 and that her doctor had said that she could not have known when she had contracted HIV. No other direct family members had this condition although her aunt and uncle from her mother's side had it and a paternal cousin and distant relative also had it.

9. The claimant's sister gave evidence and confirmed that their siblings did not know about the HIV diagnosis of the claimant and that "her brother would likely disown her sister". She also said that she and her sister, the claimant, had a closer relationship than other siblings and she said that HIV was "spoken about with disgust" in Cameroon and her sister needed medication more than anything else.

10. Reliance was made in submission on the leading authority of *N v UK* [2008] ECHR 453 although the claimant's representative, Ms Tinubu, argued that this case could be distinguished on the basis that in that case there was availability of treatment in Uganda whereas on the claimant's case the evidence suggested that there was "no treatment and there is shortage of treatment in Cameroon" (paragraph 10). It is not entirely clear whether or not it was being suggested that there was no treatment at all or whether the treatment was scarce.

11. The judge recorded the submission that the claimant needed consistent access to treatment and that (at paragraph 11) "Her body is resistant to the first line of treatment. If she goes back to Cameroon her condition will deteriorate quickly ... The [claimant's] health would suffer and she will die." The judge recorded the submission as being that her condition "reaches the threshold of Article 3 and if not Article 3, Article 8". Reliance was placed on behalf of the claimant on the decision of this Tribunal in *GS (India)* [2012] UKUT 00397.

12. Reliance was also placed on the assertion that this claimant contracted the condition whilst in the UK and that applying the case of *Okonkwo (legacy – Hakeni; health claim)* [2013] UKUT 401 Article 8 was engaged.

13. The judge then made findings of fact. He first of all stated that "each appeal is to be decided on its own facts". In considering whether Article 3 applied, he stated with regard to the decision in *N*, at paragraph 14, that "I note that the case of *N* was dismissed on Article 3 grounds because the HIV treatment was found available in Uganda".

14. At paragraph 15, the judge found as follows:

> "15. In the present case I accept that the [claimant] was diagnosed in September 2012 that she was HIV positive. In her witness statement the [claimant] states that this was before she finished her MBA course. The [claimant] stated that before she was diagnosed she contracted an infection and went to the hospital for a check. The hospital discussed an HIV test with her and it came back positive. I find that there is no evidence before me that the [claimant] had HIV before coming to the UK. The evidence before me is that the medical checks did not reveal that it could be stated as a fact that the [claimant] had HIV before coming to the UK".

15. With regard to the claimant's claim under Article 3, the judge said as follows, with regard to the position in Cameroon, at paragraph 18:

> "18. I have considered the evidence before me. I note that there is a severe shortage of HIV medication. The report on page 15 of the [claimant's] bundle with regard to HIV patients in Cameroon states that the government says it cannot supply antiretrovirals to half of the patients who needed them because of a drastic shortage of the drug. It also goes on to state that health officials say that the number of people receiving the anti-AIDS drug has soared from about 28,000 in 1990 to 200,000 in 2013 but the government's assistance to treat HIV-AIDS has remained stagnant. The background material at page 21 of the [claimant's] bundle shows that there are worrying rate of second-line treatment failure and this shows that patients with HIV on second-line antiretroviral treatment are significantly more likely to experience treatment failure than those on the first-line treatment."

16. Then at paragraph 19, referring to a report contained within the claimant's bundle, the judge continues as follows:

> "19. There is without a doubt a shortage of medication in Cameroon. This is borne out by the background material before me."

17. Then at paragraph 20 the judge accepts that the submissions made on behalf of the claimant that her "case reaches the threshold of Article 3 *because of the severe shortage of medication in Cameroon* [my emphasis] and because of the serious consequences of inconsistencies of access to the second-line of treatment she requires to survive".

18. The judge then considered the claimant's case under Article 8 "in terms of her physical and moral integrity" (at paragraph 21). He applied the case of *Okonkwo* as well as the case of *Rose Akhalu (Health claims: ECHR Article 8)* [2003] UKUT 400 and made findings as follows:

> "In the present case the [claimant] came to the UK as a student and was diagnosed in the UK. The UK has taken up her treatment and she

> would not be able to access treatment if she goes back to Cameroon. I find that removing the [claimant] from the UK affects significantly the quality of her life in terms of her survival. *The private life she has in the UK has a bearing on her prognosis*. *The [claimant] has support from her sister who is the only member of the family willing to understand her position* [again, my emphasis]. I find that the [claimant] is therefore likely to suffer loneliness in addition to the physical pain of her condition. I find that removing the [claimant] from the UK would be a disproportionate interference with her private life. I therefore find that the [Secretary of State's] decision amounts to a breach of the [claimant's] rights under Articles 3 and 8 of the [ECHR]."

Grounds of Appeal

19. In the grounds the Secretary of State relies on the decision of the Court of Appeal (which was in fact referred to in the recent Tribunal cases which will be discussed briefly below) of *MM (Zimbabwe)* [2012] EWCA Civ 279 which

> "found that the lack of equivalent medical care in the person's country of origin might engage Article 8 but only in cases where it is *an additional factor to be weighed in the balance, with other factors, which by themselves engage Article 8*"(at paragraph 1 of the grounds).

20. At paragraph 2 of the grounds reference is made to the Court of Appeal's approach in *MM* where the court had found as follows:

> "*supposing ... the appellant had established firm family ties in this country, then the availability of continuing medical treatment here coupled with his dependence on the family here for support, together establish 'private life' under Article 8*." (at paragraph 23 of *MM*).

21. The submission is made in the grounds that it is clear from this that medical care "is only relevant to Article 8 when an individual's personal ties to the UK have a direct bearing on their prognosis". It is submitted that "the question of ongoing support from friends, family or community support or a relationship in the UK does not arise in such a case". It is said that "in *MM* the context [of] family support in the UK is a key factor in the prognosis of the appellant, as he was suffering from schizophrenia and he was far more likely to stay well if he had family support." The Secretary of State then submits that "in light of that it is submitted that this is not the type of case the Court of Appeal had in mind, and that this case falls to be considered under Article 3 alone".

22. It is also submitted that the Tribunal

> "has failed to apply correctly the test set out in *GS and EO (Article 3 – health cases) India* [2012] UKUT 00397 (IAC), namely that *"it may be that although, in principle, the scope of Article 8 is wider than that of Article 3, in practical terms ... in a case like this where the claimant has no right to remain it will be a 'very rare case' indeed where such a claim could succeed*".

23. With regard to the finding under Article 3 at paragraph 5 of the grounds it is submitted that the judge "has failed to provide adequate reasons for [his] findings that the [claimant's] Article 3 rights will be breached if she returns to Cameroon" because "it is submitted that there is treatment available to her and she has family there who could support her if needed". It is submitted further "that there is no evidence that her family would not support her, especially given that her aunt and uncle suffer from HIV and there is no evidence of any discrimination by her family towards her and no evidence that they are unable to obtain medical treatment."

Furthermore,

> "even if she does suffer discrimination from her family it is submitted that she may be able to rely on the support of her uncle and aunt who also suffer from HIV and who would have a greater understanding of her illness and how to get adequate medical treatment".

24. With regard to the decision on Article 8, the Secretary of State relies made on the Court of Appeal decision in *MF (Nigeria)* [2013] EWCA Civ 1192 in which it is said that the Court of Appeal

> "confirms that the Immigration Rules are a complete code that form the starting point for the decision-maker" and that accordingly "any Article 8 assessment should only be made after consideration under these Rules" which "was not done in this case".

25. Furthermore, (it is argued at paragraph 8)

> "It was made clear in *Gulshan* [2013] UKUT 00640, that the Article 8 assessment should only be carried out where there are compelling circumstances not recognised by these Rules". It is submitted that "in this case the Tribunal did not identify such compelling circumstances and its findings are therefore unsuitable".

26. Then, at paragraph 10 of the grounds, it is submitted as follows:

> "10. It is respectfully submitted that the Tribunal has failed to provide adequate reasons as to why the appellant's circumstances are either compelling or exceptional. It is submitted that the appellant has spent the majority of her life in Cameroon and could fully readapt to life there. Any private life she may have established here during her residence since June 2011 will be extremely limited and there is no reason why she cannot continue her private life in Cameroon. It is submitted that

there is no evidence that the appellant is dependent upon the care of her sister to survive and there are family members in Cameroon who could help support her. If she does suffer discrimination from them, it is submitted that she would have friends she could rely on if needed."

The Hearing

27. I heard submissions on behalf of both parties which are contained within the Record of Proceedings. Accordingly I will not in the course of this determination set out everything which was said to me but shall refer below only to such of the submissions as are necessary for the purposes of this determination. I have, however, had regard to everything which was said before me as well as to all the documents which are contained within the file.

28. On behalf of the Secretary of State Mr Saunders relied on the decision in *GS and EO* primarily with regard to Judge Adio's finding that removal of this claimant would be in breach of her Article 3 rights. In particular, he referred the Tribunal to what is set out at head note (i) as follows:

> "(i) The fact that life expectancy is dramatically shortened by withdrawal of medical treatment in the host state is in itself incapable of amounting to the highly exceptional case that engages the Article 3 duty."

29. Mr Saunders submitted that this encapsulated what was said in the House of Lords in *N*. In *GS and EO* both the applicants were within weeks of dying if the treatment was stopped. At paragraph 85 of that case there was a long exposition of the legal effect of the decisions in *D v UK* and also *N v UK*, and particular reference was made to what was said at paragraph 85(7) where examples were given as to what might amount to exceptional circumstances such that the "high threshold of Article 3" might be reached. These included at 85(7)(b) "where the non-availability of the treatment in the home country is due to a discriminatory policy of the state, for example, on racial, ethnic or other probative grounds." Then at (c) it is considered that

> "a further potential factor may be where the individual to be returned is a young child. There may be a potentially greater effect on that child of enduring the dying process and again may as a consequence elevate the indignity of those circumstances sufficiently to reach the high threshold under Article 3. Likewise, a parent forced to witness the dying process of her young child may amount to the level of suffering greater than that confronted by an adult dying in such circumstances and amount to inhuman and degrading treatment."

30. As is clear from the determination in *GS and EO*, Article 8 was specifically not argued in that case as (as the Tribunal notes at paragraph 85(8)(a) of its determination) "we were invited not to consider the application of Article 8 in cases of this sort. Neither appellant before us relied upon Article 8. In those circumstances we do not express any conclusions on the issue".

31. The Tribunal in *GS and EO* specifically left open the question of whether or not Article 8 could be relied on in circumstances where Article 3 could not, and at paragraph 85(8)(b) stated as follows:

> "However, in principle Article 8 can be relied on in cases of this sort. The removal of the individual would, on the face of it, engage Article 8(1) on the basis of an interference with his or her private life as an aspect of that individual's 'physical and moral integrity' (see: *Bensaid v UK* [2001] 33 EHRR 10). Unlike Article 3, however, Article 8 is not absolute and the legitimate aim of the economic wellbeing of the country would be relevant in determining whether a breach of Article 8 could be established given .. financial implications that continued treatment in the UK would entail. (See also *R (on the application of Razgar) v SSHD* [2004] 2AC368)."

32. It is right to record that at paragraph 85(8)(c) the Tribunal did go on to note that although in principle the scope of Article 8 is wider than that of Article 3, in practical terms "in a case like this where the claimant has no right to remain it will be a 'very rare case' indeed where such a claim would succeed". It is right to record that there is a distinction between the facts in that case where the applicants were not in the country lawfully and the present case where this applicant was in the country lawfully and where the judge found that she was unaware when she arrived in this country that she had a life threatening disease. This will be discussed below.

33. Mr Saunders then addressed the Tribunal as to the application of Article 8 and very fairly conceded that the decision of the Court of Appeal in *MM (Zimbabwe)* [2012] EWCA Civ 279 was "not unfavourable to the claimant". In particular, he referred the Tribunal to what the Court of Appeal in that decision said at paragraph 22:

> "Thus the courts have declined to close the door on the possibility of establishing a breach of Article 8 but they have never found such a breach and have not been able to postulate circumstances in which such a breach is likely to be established. Since *Bensaid* in 2001 there has been no example of a successful Article 8 claim in a mental health case. The courts and tribunals have merely been left with the difficulty of identifying a 'flagrant denial' or a 'truly exceptional' case, neither of which provide any standard of measurement."

34. The Court of Appeal then at paragraph 23 postulated certain circumstances in which an Article 8 claim could succeed even though an Article 3 claim could not as follows:

> "23. The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve the comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

35. Mr Saunders then referred the Tribunal to the subsequent decision of this Tribunal in *Rosaleen Akahalu (Health claim: ECHR Article 8)* [2013] UKUT 00400 and in particular that it was a relevant factor (again in this case assisting this claimant) whether or not an applicant discovered the illness when here or knew about it before he came. It was accepted in this case that the judge's finding was that this claimant had not discovered she was HIV positive until she was present in this country.

36. It having been established and accepted now on behalf of the Secretary of State that an applicant could succeed on Article 8 grounds relying on medical grounds among other grounds, the first question had to be how does one get to Article 8 on private life grounds if this is not established under the specific Rules relating to Article 8. That could be referred to as the *Gulshan* question, in respect of the decision of this Tribunal in *Gulshan* [2013] UKUT 00640.

37. Following discussing with the Tribunal Mr Saunders appreciated that this would be a matter which the Tribunal would deal with before making its decision. However, he asked that the Tribunal record his submission that the decision in *Gulshan* had to be considered.

38. What then had to be determined was whether the medical consequences in conjunction with the rest of this claimant's circumstances were sufficient to render her removal disproportionate. That depended on the sustainability of the factual findings which the Secretary of State attacked at paragraph 10 of the grounds (which have been set out above).

39. It was the Secretary of State's case that if the facts had been properly considered this would have resulted in a decision that removal was

proportionate, but on this aspect of the appeal Mr Saunders did not wish to expand on the grounds.

40. On behalf of the claimant, Ms Norman invited the Tribunal to find when looking at paragraph 10 of the grounds of appeal that the arguments advanced there did not amount to more than speculation. There was no evidence that there were family members in Cameron who could help support the claimant or that she would have friends she could rely on if needed. Although the Secretary of State had submitted that there was no evidence that the claimant was dependent on her sister, the judge had found that she did have support from her sister and that she was the only family member who understood her position. These findings were open to the judge.

41. Furthermore, it did not appear to be the case (and reference here was made to paragraph 9 of the determination) that any submissions had been made on behalf of the Secretary of State before the First-tier Tribunal that there were any friends in Cameroon who could support this the claimant and it does appear that it had been accepted by the Presenting Officer at that hearing that there was a close relationship between the claimant and her sister.

42. With regard to the finding on Article 3, although it was the claimant's case that this finding was sustainable, following discussion with the Tribunal, in the event that the Tribunal considered that the finding on Article 3 was not sustainable, but that the finding regarding Article 8 was, the claimant did not seek any further adjournment in order to obtain an expert report with regard to precisely how available the antiretroviral second line drugs were in Cameroon.

Discussion

43. I start first of all by considering the findings on Article 3. I note that at paragraph 20 of his determination the judge refers to “the severe shortage of medication in Cameroon”. He also refers earlier to the statement contained within a report within the claimant’s bundle with regard to HIV patients in Cameroon, “that the government says it cannot supply antiretroviral to half of the patients who needed them because of the drastic shortage of the drugs”.

44. In other words, it is not the case that the drugs which this claimant would need are not available at all, but that the reality is she would be unlikely to get them. In my judgement the facts in this appeal are not distinguishable from those which were present in *N* and I am bound by the decision in that case. The basis upon which the decision was made in that case was that it would only be in exceptional circumstances that an applicant such as this claimant would be entitled to remain under Article 3 effectively because this country is not the health service of the world and cannot be expected

to provide medical assistance to every person who comes here regardless of the circumstances in which they have come, merely because they themselves would find it hard to obtain medical treatment in their home countries which could be available if they were richer or better connected. As I say, *N* is a decision which is binding on me.

45. However, that is not the end of the matter. It was made clear by the Court of Appeal in *MM* and this has been confirmed by subsequent decisions of this Tribunal in *Akhalu* and *Okonkwo* that a claim might in certain circumstances arise under Article 8 even though the medical circumstances on their own would not be sufficient to pass the threshold required before a claim under Article 3 would succeed. In *MM* in particular, the Court of Appeal considered that one of the factors to which regard should be had was whether or not the private/family life which an applicant had in this country was such that it could be said that the medical circumstances when coupled with a dependence on this family life would be such as to make removal of an individual in any particular case disproportionate.

46. The decision in such a case is always going to be a finely balanced one which must be made by the judge who hears the evidence. It is only in circumstances where the findings that that judge makes were not open to him that a decision can properly be interfered with by this Tribunal. In this case although Judge Adio, as I have found, was not entitled to allow the appeal under Article 3, nonetheless he has found clearly on evidence which was before him that the reality was that this appellant would be unlikely to receive the drugs she needed for her survival or at any rate for her proper medical care in Cameroon, and he was also entitled to find as he did that the only family member "willing to understand her position" was her sister who is at present in this country. I agree with Ms Norman that the suggestion at paragraph 10 of the grounds that there are family members in Cameroon who would help support her and that she would have friends she could rely on if needed is not supported by any evidence at all; the evidence in this case went the other way and the judge was entitled to accept it.

47. We also in this case have a clear finding which the judge was entitled to make that unlike the position in *GS and EO*, this claimant was not only in this country lawfully but she had arrived here unaware that she suffered from any serious medical condition. So she is in a position where as a lawful visitor going about her activities in the way that she said she would when she came (that is she was completing an MBA) she became ill. She depends on her sister for a considerable amount of support. She certainly has a private/family life here to the extent that Article 8 is engaged. In my judgement the judge was entitled, having weighed all the factors together, to find that her removal now would be in breach of her Article 8 rights because it would not be proportionate. While this is not necessarily the decision which would be made by every judge, it was nonetheless a decision which was open to him and accordingly should not be interfered with by this Tribunal.

48. It follows that although the decision of the judge with regard to Article 3 must be set aside and remade, there is no proper basis upon which his decision on Article 8 should be set aside and I will so order.

Decision

I set aside the decision of the First-tier Tribunal allowing the appeal under Article 3 and remake the decision as follows:

The claimant's appeal is dismissed under Article 3.

With regard to the decision under Article 8, I find that there was no error of law in the making of this decision, and the decision of the First-tier Tribunal allowing the claimant's appeal under Article 8 is accordingly affirmed.

Signed: Date: 27 May 2014

Upper Tribunal Judge Craig