



IAC-PE-SW-V1

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

Appeal Number: IA/30255/2013,  
IA/30233/2013, IA/30242/2013,  
IA/30246/2013 & IA/30251/2013

**THE IMMIGRATION ACTS**

**Heard at Manchester**

**On 27<sup>th</sup> August 2014**

**Determination  
Promulgated**

**On 24<sup>th</sup> October 2014**

**Before  
DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

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

Appellant

**and**

**CEI, LNI, LOI, JCI & JCI**

Claimants

**Representation:**

For the Appellant: Mr Schwenk, instructed by Fursden,Knapper Solicitors  
For the Respondent: Mr Harrison , Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The claimants are all citizen of Nigeria. These appeals relate to the mother and father of a family and their children.
2. These proceedings concern the welfare, well being and interests of children. Taking account all of the circumstances, in order to protect the interests of the children, I consider it necessary to make an anonymity direction.
3. This is an appeal by the Secretary of State for the Home Department. I have however for the purposes of the present determination described the original applicants/appellants to the First -tier Tribunal as the claimants. I refer to the Secretary of State for the Home Department as the SSHD.

4. The SSHD seeks to appeal against the determination of First-tier Tribunal Judge Cameron promulgated on 9<sup>th</sup> January 2014. By the determination the judge allowed the appeals of each claimant against the decisions of the SSHD. The decisions taken in respect of each of the claimants was to refuse the claimant further leave to remain in the United Kingdom and thereupon to remove each of them to their country of nationality. The decisions are dated 27 August 2013.
5. In allowing the appeals the judge allowed each appeal on the basis of article 8 of the ECHR. The judge had considered whether the appeal should be allowed under the Immigration Rules or Article 3 of the ECHR and determined that the claimants could not succeed under the Immigration Rules [paragraph 276ADE Private life or Appendix FM] or under Article 3.
6. Leave to appeal was granted to the respondent on 8 April 2014. In granting leave to appeal it is suggested that the judge applied the wrong test in respect of the health of the appellant LOI submitting that the threshold in medical cases is a high one and there is a lack of adequate reasoning. There is a reply and the representative for the claimants before me sought to re-open other issues in the case.

#### Factual background

7. The basis for these appeals relies upon the condition of the child, LOI, date of birth the 29 August 2006. There are several experts' reports, which deal with the medical condition of the child. The remaining claimants are dependants upon the claim of LOI. Were it not for the condition of LOI, the remaining appellants would have limited prospects of remaining in the UK.
8. The mother of the family obtained leave to enter the United Kingdom as a student prior to January 2009. Consistent with the leave granted the mother came to the United Kingdom as a student. The family came to the United Kingdom as dependants of a student and entered the UK on 2 January 2009.
9. It has to be noted that at the time of entry LOI would have been two years and three months old.
10. Subsequently the mother was granted further leave to remain as a Post-Study Work Migrant until 7 June 2013, with the family being granted leave in line with the mother. On 14 May 2013 applications were made for further leave to remain in the United Kingdom. The applications were refused on the 9<sup>th</sup> August 2013.
11. The basis of the appellants' case to remain relates to the medical condition of the child LOI. As noted by the judge in paragraph 21 LOI suffers from a series of medical conditions. The judge has carefully considered the medical reports submitted.
12. As of 14 October 2013 Dr Curran , Consultant Paediatric Neurologist describes the condition of the child in the following terms:-

"[He]..... has profound and severe neuro-disability. He has quadriplegic cerebral palsy following hypoxic-ischaemic encephalopathy, epilepsy, long-term chronic oxygen requirement, recurrent chest infections and severe and profound developmental delay.

In dealing with the child's medical requirements in the same letter Dr Curran states: --

"His medical condition remains unstable, where he continues to have frequent chest infections requiring antibiotics. He is on continuous oxygen. This is essential for his health and continued well-being. He requires regular reviews by the multidisciplinary team which includes dieticians, physiotherapists, oxygen nurse specialist, consultant neurologist, consultant respiratory physician and the consultant palliative care specialist."

In the conclusions it is questioned whether or not the appellant would receive appropriate healthcare in Nigeria. However there does not appear to be a definite opinion that the child would not.

13. Other reports refer also to the cerebral palsy -- spastic quadriplegia secondary to birth asphyxia, scoliosis, epilepsy, significant developmental delay and "*gastro-intestinal dysmotility*". There appears to be a technological dependency on a pump feed. There is some reference to his "*spasticity and dystonia*" having improved with his change of medication.
14. The reference to birth asphyxia is significant as the cause of many of the symptoms emanates from problems at birth. By the time that the child was entering the UK there would have been a marked lack of his achieving developmental stages at least, if not clear evidence of some of his symptoms.
15. The letter from Alder Hey Children's Hospital by Dr Susie Holt does refer to the fact that the child has had complex needs since birth. The letter also makes reference to the fact that the life of the child will be significantly shortened from the norm.
16. LOI is wheelchair-bound and is oxygen dependent. He has a large number of daily medications. There is reference in the reports to his daily regime requiring the assistance of between one and two people on a regular basis. It is clear that the funding for that is being provided by public authorities, whether that be the NHS, the central government or local government is unclear.
17. In a letter from Ms Leanne Turner Clinic Specialist Physiotherapist there is the following: --

"L has spastic quadriplegia cerebral palsy which has resulted in multi-complex medical problems which vary from him needing moderate intervention from multiple specialist professionals to higher levels of intervention. L has severe restriction in his mobility and requires full care from 1 to 2 people and specialist

equipment to help him move around. He also needs specialist eating and pastoral care equipment to maintain his posture to prevent pain and discomfort.

18. There is then reference to the chest problems which have to be monitored on a daily basis as the same could prove fatal. The child has a complex feeding regime to avoid reflux and seizures.
19. There is in place an emergency care plan. There is reference to LOI experiencing seizures more often and suffering from a poor sleep pattern. There is an End of Life Care Plan in place with a placement being made at Claire House Hospice. The care plan makes provision for resuscitation and maintenance of bodily functions where there is reversible illness. The care plan does contemplate the prospect of further brain or cardiac damage and, whilst it acknowledges that necessary medication to ensure comfort would be appropriate, it concedes circumstances in which a natural death may be appropriate.
20. The medical condition of the child appears to be accepted. The issue before the first-tier tribunal was how that was to be considered under article 8 including consideration of the best interests of the child.

#### Appeal and grounds

21. The appeals were heard by First-tier Tribunal Judge Cameron on 23 December 2013 and the determination promulgated on the 9<sup>th</sup> January 2014.
22. Application for leave to appeal was not lodged by the SSHD until 9 March 2014. There would normally be only five days in which to lodge an application for leave to appeal. In the normal course of events the application is over six weeks late. The judge dealing with the application extended time.
23. The grounds of the application in essence are:-
  - a) The findings by the judge are inadequate, specifically with regard to whether the LOI could access the quality of medical care in Nigeria comparable with that he is receiving in the United Kingdom. The judge has misapplied the law as set out in *MM (Zimbabwe) v SSHD* [2012] EWCA Civ 279.
  - b) The case law makes clear that medical care is only relevant to article 8 where an individual has personal ties to the UK.
  - c) The case of *GS & EO (Article 3-health cases) India* [2012] UKUT 00397 makes clear that whilst it may be that article 8 is wider than article 3, it would still be a rare case where a claim could succeed on article 8 grounds in health cases. Reliance is also placed on *KH (Afghanistan) v SSHD* [2009] EWCA Civ. 1354.

- d) It is asserted that the judge has failed to consider the case of Azimi-Moayed [2013] UKUT 00197 and the legal guidance given therein.
- e) Finally it is asserted that the judge has failed to give adequate consideration to the legitimate interest of maintaining effective immigration control.

#### Issues in the case

- 24. The appeals have been allowed on Article 8 grounds.
- 25. The starting point with regard to medical treatment and the ECHR is N 2005 UKHL31 and D v UK (1997) 24 ECHR, although the cases were in the main considering Article 3 and emphasise the high threshold that exists in respect of Article 3.
- 26. The threshold for Article 3 can be seen in the cases of AN v SSHD (2013) CSIH 111, R on the application of SQ (Pakistan) v UTIAC 2013 EWCA Civ 1251 and AE (Algeria) v SSHD 2014 EWCA Civ 653. However the cases also make the point that in respect of children and the statutory duty under Section 55 of the 2009 Act to consider the best interest of the child Article 8 may provide better and wider remedy or protection to the child than Article 3.
- 27. The case of JA (Ivory Coast) 2009 EWCA Civ 1353 makes the point that a distinction has to be drawn between individuals, who entered the United Kingdom lawfully and those who entered unlawfully. It acknowledges that in respect of those entering unlawfully the case of N 2005 UKHL sets out the criteria to be applied. Those that are lawfully in the country and who have acquired a right to NHS treatment would however have a stronger basis for seeking to rely upon Articles 3 and 8.
- 28. Even in respect of such individuals the consequence to the health of an applicant has to be considered carefully. The case of Akhalu (health claim: ECHR) Nigeria [ 2013] UKUT 400 deals with the issue of claims on the basis of health. In Akhalu it has to be noted that the appellant was suffering from kidney failure and required kidney dialysis. Without such treatment her life would be significantly foreshortened. It was found to be inappropriate for her to live in a semi rural area in her home country, where treatment would not be available. The Upper Tribunal upheld a decision by the First-tier Tribunal to allow the appeal on article 8 grounds.
- 29. In Akhalu careful consideration was given to a number of cases including MM (Zimbabwe) v SSHD [2012] EWCA Civ 279 and GS & EO (Article 3 -- health cases) India [2012] UKUT 397. In dealing with MM the submission made by the SSHD has been considered, that is that it is only where otherwise there are significant aspects of private life tying an individual to the United Kingdom that the healthcare issue needs to be considered. That

approach is not an accepted within the case law. Rather it seems to be a factor to be taken into account in carrying out proportionality exercise.

30. As set out in Akhalu at paragraph 45 and 46 in respect of Article 8 :-

45 The correct approach is for the judge to have regard to every aspect of the claimant private life here, as well as the consequences for her health of removal, but to have in mind when striking the balance of proportionality that the comparison of levels of medical treatment available is something that will not in itself have any real impact on the outcome of the exercise. The judge must recognise, ..... that it will be a rare case that succeeds where this is an important aspect of the claimant case.

46 Put another way, the consequences of removal for the health of the claimant who would not be able to access equivalent health care in their country of nationality as was available in this country, are plainly relevant to the question of proportionality. But when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, there was consequences do not weigh heavily on the claimant's favour speak cogently in support of the public interest in removal.

31. The case law and the approach to be taken with this kind of case are otherwise fully rehearsed in the case of Aklahu.
32. Before the First-tier Tribunal it was not contended that the appellants could succeed under the Immigration Rules (see paragraph 19). Submissions were made on the basis of article 3 and article 8 of the ECHR.
33. The First-tier Tribunal has clearly considered the matters set out above and has considered the medical reports in detail. Of significance in that regard is the fact that the reports referred to the child needing daily oxygen and a steady and constant supply. Without such there would be a serious risk to the child's life.
34. It has to be acknowledged, as it is in the case law, that, where the NHS is providing such a level of care, given the limited funds the provision of this level of care to one individual is depriving others. As is stated in several of the cases the UK is not the health service for the world. However such is but one factor to be taken into account in assessing the proportionality exercise. It has to be considered in light of the fact that the entitlement to NHS health care can be acquired by and is based upon residence. If it had been intended that more stringent condition were appropriate regulations could have been put in place to set such conditions.
35. There is a degree to which it is suggested within the determination by the judge that the child was not diagnosed until he had been in the United Kingdom for some time. That has to be looked in the light of the fact that

the condition has existed since birth by reason of birth asphyxia. The child was two when he came to the United Kingdom and his condition must have been apparent prior to the family coming to the UK.

36. Having carefully considered the case law the judge has looked at all the material aspect of this case including the best interests of LOI and the other children. The judge has also considered the importance and significance of the public interest [ see paragraph 31]. The judge has identified that the medical issues related to LOI and the consequences to the family of those issues are a significant factor. The judge has properly balanced the public interest in assessing the Article 8 rights of the child and the family.
37. The child was lawfully in the UK with his parents. He was lawfully receiving NHS treatment. The family have been in the UK for some years. Whilst the regime to deal with the child's problems is at public expense and significant public expense, the access to such treatment was acquired through lawful residence. There is in place a very structured regime to ensure that the basic needs of this child are met and that suffering, pain and discomfort are controlled as far as possible. There are problems as to whether treatment would be available in Nigeria. There is an End of Life Care Plan in place to deal with the passing of the child and to ease such as far as possible. A significant and substantial factor in the present appeal is the best interests of the child.
38. Having carefully considered all aspects of the case the judge was entitled to find that the decision in respect of the child was not proportionately justified. In the light of that the decision in respect of the remaining members of the family were also not proportionately justified and that the appeals were therefore to be allowed on article 8 grounds. The judge was not merely allowed the appeals because of the disparity of treatment. The judge has clearly assessed circumstances of the child LOI and was satisfied that this was one of those very rare cases where the need for continuation treatment being received in the United Kingdom to the child coupled with the other factors was such as to justify the appeal on article 8 grounds.
39. The appellants' representative sought to argue that this is one of those rare appeals, which meets the requirements of article 3. Given the case law cited above the judge's approach with regard to article 3 has been properly justified and I do not find that there is any error of law in the approach of the judge to article 3.
40. In the circumstances there is no material error of law in the determination. I uphold the decision to allow these appeals on article 8 grounds.

Signed

Date

Deputy Upper Tribunal Judge McClure

27<sup>th</sup> August 2014

Direction regarding anonymity- rule 45 (4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify the appellants or any member of the appellants' family. This direction applies both to the appellants and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

Signed

Dated

Deputy Upper Tribunal Judge McClure

27<sup>th</sup> August 2014