



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09550/2017
HU/09555/2017
HU/09557/2017
HU/09560/2017

THE IMMIGRATION ACTS

Heard at Field House
On 24 April 2019

Decision & Reasons Promulgated
On 15 July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

D.S.U.
O.A.U.
O.O.U.
K.D.U.

(ANONYMITY DIRECTIONS MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Slatter of Counsel instructed by Paul John & Co.
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These linked appeals have come back before me to remake the decisions in the appeals pursuant to the 'error of law' hearing held on 28 November 2018. The text of

the error of law decision and Directions are appended hereto, and should be read as an integral part of this Decision.

2. It is to be recalled that I determined that the decision of the First-tier Tribunal was "*one of detail and clarity, and... save in one respect is unimpugnable*" (paragraph 3 of the error of law decision). The issue that led to the decision of the First-tier Tribunal being set aside because it was material to an evaluation of the best interests of KDU, was that the Judge was misconceived in not recognising that the supporting medical evidence suggested an ongoing neurological assessment was required: see in particular paragraphs 11, 17, 18, and 19 of the error of law decision.
3. It may also be seen from the error of law decision that there was some discussion as to whether a neurological assessment would be undertaken in the UK, during which the Appellants' counsel referred to the relevance of such an assessment as an aspect of evaluating best interests (see the second of the two paragraphs numbered 21).
4. Pursuant to the foregoing, the Directions were focused on the issue of neurological/neurodevelopmental assessment (paragraph 22).
5. Since the error of law hearing the Appellants have filed a small additional bundle, including a witness statement dated 19 March 2019 deposed by the First Appellant. I was also provided with a further letter dated 15 March 2019 from the Consultant Haematologist at the University of Port Harcourt Teaching Hospital in Nigeria, and an NHS card stating the bearer to be at risk of transfusion-associated graft-versus-host disease ('GVHD').
6. DSU supplemented her witness statement by way of oral evidence before me, both in-chief and under cross-examination.
7. Bearing in mind the basis upon which the error of law was found, and the focus of the ensuing discussion and Directions, it is of particular note that no neurological assessment has been conducted, and indeed it is now the position that it is not intended that KDU be submitted to such a process.
8. In this latter regard I was told that DSU had spoken to friends in the medical field and had come to understand that such an assessment would require an MRI and other scans to be conducted. DSU did not wish to put her daughter through such processes. Instead, it was preferred to explore the option of obtaining help through

psychiatric/psychological support and/or counselling (see further below). DSU acknowledged that there was a funding issue given that KDU was no longer entitled to NHS treatment without payment, but said that in the event she had not priced the cost of a neurological assessment because the cost had not been the only reason for deciding not to pursue such an option.

9. Necessarily the fact that KDU is not to undergo a neurological/neurodevelopmental assessment - which seems to be the position adopted irrespective of geographical location (i.e. it will not take place whether she is in the UK or in Nigeria or elsewhere) - means that there is not available the sort of evidence that the Appellant's counsel at the error of law hearing anticipated would be of assistance in evaluating best interests. Accordingly, in my judgement, all that can be inferred in respect of KDU's neurological and cognitive function from the circumstances of the referral for an assessment by healthcare professionals in or about 2014 and again in November 2018, is that there has been some concern as to neurological and/or neurodevelopmental deficit and/or cognitive impairment such as to warrant an assessment.
10. As regards the extent of any deficit it seems that the best evidence hitherto is that of the psychological assessment report dated 9 June 2016: see paragraph 10 of the error of law decision.
11. In this context I note the following in respect of the further evidence that has been filed before the Upper Tribunal:
 - (i) Letter dated 31 December 2018 from Consultant Psychiatrist Dr Lalitha de Silva, based on a consultation on 12 December 2018. It is recorded that DSU reported that KDU *"is very slowed down", "has emotional outbursts, and finds interaction with people difficult", and "has also been low in mood and anxious"*. KDU's sleep was described by her mother as *"disturbed"*, and it was said that she 'snacked' at odd times. School attendance was described as a regular *"but [she] does not interact well with others"*. Mobility was said to be *"limited to some extent"*. DSU also reported that her daughter required a lot of help for both her physical problems and emotional problems. However, Dr de Silva also noted that KDU *"gets good reports from her teachers"*. It was also recorded that KDU sang with her mother at church, socialised when she was at church and was *"comfortable"* within her family and within the church community. (I interject to note that I have taken into account the contents of the letter of support dated 14 March 2019 from the Deaconess at Christ Embassy church.) On examination KDU *"came across as a very pleasant girl [and] made good eye contact"*. Although she was quiet at the beginning she later contributed to the discussion; however, *"Her mood appeared to be low and she was anxious"*. Dr de Silva opined that KDU

“suffers from mixed anxiety and depression of moderate intensity”, adding the uncontroversial context “she has been very unwell for five years”. In this latter context the treatment in the UK was noted. Dr de Silva also noted “her schooling has been interrupted and she is slowly settling in her current school”. He then expressed the view that “She requires treatment for emotional problems, assessing and monitoring her mental state, psychotherapy and maybe medication”. In this regard it was noted that KDU was known to CAMHS, and Dr de Silva “advised her to seek help from CAMHS”. Dr de Silva also opined that in light of the turmoil in her life, KDU “needs to have some stability in her health and also in her school environment to help her to develop herself and recover”, adding “Any further upheavals in her schooling or her environment will be greatly detrimental to health”.

(ii) KDU’s school has provided a letter dated 25 March 2019 signed by the headteacher confirming that she is a Year 9 student, and *“attends weekly counselling sessions with Harrow Horizons, an emotional well-being service”*. The sessions are described as *“on-going to support [KDU] with her mental health and well-being”*. It is stated: *“This service is extremely essential to [KDU]’s emotional development”*. (Print-outs of two text messages from Harrow Horizons in respect of appointment details have also been provided as evidence of such counselling sessions.)

(iii) For the avoidance of any doubt I do not consider that there is anything of substance to which I should accord weight in respect of this issue in the letter dated 15 March 2019 from the University of Port Harcourt Teaching Hospital. The letter is not based on any actual face-to-face assessment of the Appellant. Further, notwithstanding that I note that the letter is seemingly signed by a different consultant haematologist, no attempt has been made to address the concerns raised in the error of law decision in respect of the earlier letter from the Hospital (error of law decision at paragraphs 13 and 14), and the current writer, another consultant haematologist, similarly does not indicate any relevant expertise in neurodevelopmental neurological matters.

12. Drawing these matters together, in my judgement the following picture emerges of KDU’s health and cognitive ability:

(i) In respect of sickle-cell disease, despite the complications arising after a bone marrow transplant because of ‘graft versus host’ disease, this is currently managed in consequence of the remedial effect of the transplant together with the ongoing prescription of penicillin as a prophylactic antibiotic to prevent infection.

(ii) In consequence of a cerebrovascular accident in 2013 she was left physically weakened and received physiotherapy to combat such symptoms. There is

some residual weakness, but not such as to inhibit her attendance at a mainstream school, and engagement in social activities through her church.

(iii) The cerebrovascular accident has also resulted in a degree of cognitive impairment, but for the main part the assessment conducted in June 2016 showed function to be within normal ranges save in respect of processing speed which was extremely slow.

(iv) KDU also presently suffers from mixed anxiety and depression of moderate intensity, in respect of which she has input by way of weekly counselling sessions provided by an emotional well-being service.

13. Further to the above, I note that there was some discussion at the hearing in relation to the NHS card identifying KDU as being at risk of transfusion associated GVHD. This card states *"If I need to have a blood transfusion, cellular components (Red Cells and Platelets) MUST BE GAMMA IRRADIATED"*. The reason for this is given on the back of the card as *"bone marrow transplant"*. The date of the issue of the card is not easily discernible but appears to be in 2014. The card also contains the following information: *"Irradiated blood needed indefinitely or until _/_/_"*. Because the 'until' date had not been completed, I was invited to infer that irradiated blood would be needed indefinitely. I am content to do so.
14. Mr Slatter acknowledged that whilst the Appellants sought to suggest that gamma irradiated blood would not be available in Nigeria, there was no supporting evidence to that effect.
15. In her oral evidence DSU said that this card had been given to the Appellant when she left hospital after her initial bone marrow transplant. Necessarily, this pre-dated DSU's and KDU's return to Nigeria in May 2015. When asked why the supposed unavailability of gamma irradiated blood in Nigeria had not inhibited return in May 2015, DSU stated *"we did not really think about it"*. She was then asked when she had found out that such blood was not available: she stated that they had made enquiries but did not get an answer; they had asked medical personnel and had been told that there was a blood bank *"but did not really get an answer"*.
16. I note that the Appellants have produced two letters from different consultant haematologists at the University of Court Harcourt Teaching Hospital. The more recent letter, dated 15 March 2019, which – as I have observed above – does not address the concerns in respect of the earlier letter, refers to such things as the absence of infrastructure, the poor quality of neurological support, and risks of infection. However, nothing specific is said about gamma irradiated blood. This is

notwithstanding that the history of GVHD was clearly known to the writer. It seems to me almost inconceivable that if it were genuinely the case that such blood was not available in Nigeria, the consultant haematologist writing the letter of 15 March 2019 would not have expressly stated so as a core element of his letter.

17. I note that there is a reference to gamma irradiated blood in the earlier letter of 4 May 2017: *“There is also high risk of infection and malaria burden in Nigeria and with [KDU]’s medical history, current facilities may be inadequate to cope with any new health challenges that may arise such as giving her gamma irradiated blood; the facilities are unfortunately not available currently.”* In my judgement there is a lack of clarity in this passage, switching as it does between the notion of facilities possibly being inadequate, to facilities not being available. I have previously observed that the writer did not accurately set out or reproduce the opinions of the UK healthcare professionals (paragraph 14 of the error of law decision); in my judgement this necessarily undermines the general reliability of this particular document. Moreover, it predates the subsequent letter by approximately 2 years, and so in any event cannot be seen as reliable evidence of the current circumstances in Nigeria.
18. I am sceptical that DSU did not ascertain that such blood was available before returning to Nigeria with her daughter after the transplant. In any event the enquiries that she claims to have made and claims to have been inconclusive are hardly evidence of unavailability.
19. In all such circumstances, and also bearing in mind Mr Slatter’s acknowledgement that there is no supporting evidence on point, I find that I am not satisfied that the Appellants have shown that gamma irradiated blood is not available in Nigeria.
20. In this context I also note that transfusion – regular or otherwise – is no part of KDU’s ongoing treatment. The First-tier Tribunal Judge noted that it was confirmed in evidence that no transfusions had been required since the transplant (paragraph 59). The need for a transfusion accordingly is only to be envisaged in the event of some sort of medical emergency such as a serious traffic accident. It seems to me that this is essentially too remote to sound with any significance in the overall context of these appeals.
21. The best interests of a child or children have to be taken into account as a primary – although not paramount – consideration in the context of immigration decisions and appeals.

22. I am persuaded that it is in KDU's best interests that her circumstances remain much as they are at present. I take into account the very difficult circumstances of the medical problems that have impacted on her early life, and have seen her travel from Nigeria to the UK, return to Nigeria, and then have to return to the UK again for further treatment following the episode of GVHD. Although her sickle-cell disease seems largely now under control, there are continuing consequences of the cardiovascular accident. More particularly – and most likely in consequence of her experience of illness with significant medical interventions – KDU is diagnosed with symptoms of depression and anxiety in respect of which she is receiving counselling at school. I acknowledge Dr de Silva's opinion as to the benefits of a period of stability, and the potential detriment of further upheaval.
23. In reaching this decision I take into account that KDU's presence in the UK has been at the cost of being apart from her father (albeit he has made annual visits to the UK). To that extent, I acknowledge the force of the argument that it would be in her best interests to return to Nigeria to resume family life in the company of both parents, rather than just her mother. In this context I accept that the support that her mother has given her would continue and act to insulate her against the potential upheaval of relocating back to Nigeria again, where she would also then have the support of both parents to manage any psychological or other detrimental consequences of relocation. To this extent the question of whether KDUs best interests are protected and promoted by remaining in the UK or returning to Nigeria, is finely balanced: it seems to me that it is only marginally the case that the stability referred to by Dr de Silva outweighs the benefit of residing with both parents. In this context I note that Dr de Silva has not addressed the circumstance of the absence of KDU's father from her life, and has not expressly addressed the extent to which loving parents might effectively manage relocation to minimise the impact on KDU.
24. In this context I also find that there is nothing in the materials before me to establish on a balance of probabilities that the Appellant would not have access in Nigeria to any necessary continuing treatments, whether they be in respect of physical or mental problems. In the event of any extreme complications – which as matters stand are not shown to be more likely than not – there will again be the potential option of travelling outside Nigeria for medical treatment should any required treatment not be available in Nigeria. Nor is there any supporting evidence to suggest that KDU's circumstances and needs could not be accommodated within the education system in Nigeria.
25. In this context and generally I note that there does not appear to be any significant financial difficulties facing the family. For example, in the application form signed by the First Appellant on 5 February 2016 it was stated in respect of financial resources that her husband provided her in the UK with £400 weekly, together with £1600

monthly for rent and £400 monthly for bills. It was also stated “*my husband provides what we need*” (question 5.13). Nothing further has been stated of significance in respect of the family’s financial circumstances that might suggest anything other than that the Appellants will be adequately maintained and accommodated in Nigeria, or that the considerable extra expenditure in supporting the family whilst it is in the UK could not be redirected, for example, to support KDU in her education in Nigeria.

26. Although the primary focus of these appeals before the First-tier Tribunal and before the Upper Tribunal has been upon the circumstances of KDU, I have not lost sight of the fact that there are two other minor Appellants. OAU (just a few days short of his 10th birthday at the date of hearing) and OOU (aged 12 years 4 months at the date of hearing), last entered the UK in November 2015, coming to join their mother and sister who had returned to the UK in July 2015 in consequence of the episode of GVHD. Nothing specific is presented or argued in respect of any particular educational, medical, or other needs of OAU and OOU. In such circumstances it seems to me that their best interests would be protected and promoted if they were to return to their country of nationality with their mother and sister, to enjoy family life in the company of their father. The primary reason for them being in the UK is the necessity of their mother having come here to accompany their sister whilst she underwent her various treatments. Of course, in the event that their sister and mother were to remain in the UK, it is likely that their best interests would be served by continuing to live in the UK with them.
27. I take forward the ‘best interests’ considerations set out above into my consideration of the grounds of appeal based on Article 8 of the ECHR, bearing in mind also that the factual matrix for the best interests considerations is similar to the facts and circumstances that inform the Article 8 evaluation.
28. In her witness statement DSU states that KDU “*has lived in the UK for 5 years and 6 months*”. This dates back to the first entry in September 2013. I accept Mr Lindsay’s submissions in this regard that this is to overstate the length of residence in the UK.
29. In my judgement it is plain from the evidence and circumstances that when the First Appellant came to the UK with her ill daughter in 2013 it was with the genuine intention of remaining temporarily for medical treatment. I find that it was in the minds of the First Appellant and KDU that they were in substance visitors to the UK, and that their home remained in Nigeria, where the First Appellant’s husband and other children continued to reside. Indeed, although the other children visited the UK during this period, it was the case that DSU and KDU returned to Nigeria in May 2015 at a time when it was considered that the medical treatment had reached a

conclusion, and an appropriate period of recovery had elapsed. In my judgement it was the intention in May 2015 that the family would thereafter continue to reside in Nigeria. It was only because of the unfortunate circumstance of the GVHD episode that a return to the UK for further treatment was made. I also find that at the time of the return to the UK in November 2015 it was not envisaged that any of the family members should relocate to the UK on a permanent basis, but rather that again entry was for the temporary purpose of seeking to resolve the medical issues of KDU.

30. Whilst it is inherent in the application made in February 2016 that the intention - at least of the responsible parent in the UK - had become to seek a less limited residence in the UK, it is apparent that the primary motivating force was to achieve some 'peace of mind' "*knowing there are adequate facilities and medical personnel to look after [KDU]*" (Respondent's bundle before the First-tier Tribunal at A40). The application was not made on the basis of any particular length of residence in the UK, or otherwise on the basis of the establishment of any sort of private life by any of the Appellants, who had - as I find - up until that time envisaged their family and private lives resuming and continuing in due course in Nigeria.
31. In such circumstances it seems to me that not only does the nature of any private life established in the UK fall to be characterised as having been established at a time when immigration status was 'precarious' in a technical sense pursuant to section 117B(6) of the Nationality Immigration and Asylum Act 2002, but also in a practical sense - at least up until the date of the application - it was not perceived by the Appellants themselves that they had established a home in the UK. And even then, the basis upon which they sought leave to remain was not because of the quality of any private life that had been established by any or all of them, but because of the medical concerns attaching to the circumstances of KDU.
32. Necessarily I acknowledge that there has been a passage of time since the making of the application in February 2016 in which each of the Appellants will have developed something further in respect of private lives. However, beyond the supporting evidence from the church, the focus of the evidence in respect of private life relates to the medical circumstances and education of KDU. Little else meaningful is advanced in respect of the private life of any of the other Appellants.
33. There is no aspect of the Immigration Rules that can avail KDU or any of the other minor Appellants. Nor is there any basis for reaching any different conclusion from that of the First-tier Tribunal Judge in respect of paragraph 276ADE(1)(vi) as it pertains to the First Appellant.

34. As regards a freestanding evaluation of Article 8, I indicated to Mr Slatter during the course of submissions that I did not see any difficulties for the Appellants – and KDU in particular – in respect of the first four of the five **Razgar** questions. I have also indicated above that I consider – albeit marginally – that it is in KDU’s best interests presently to remain in the UK.
35. In considering the fifth **Razgar** question – proportionality – I take into account in respect of KDU the matters that have informed my evaluation of best interests. What is particularly pertinent in this regard is that she is working towards achieving a period of stability after the most extraordinarily difficult early years of her life, and is doing so with a degree of support by way of a counselling service. I acknowledge that there will be a disruption in the event of her removal from the UK. However, as I have also pointed out above, this would be ameliorated to some extent by the continuing support and guidance that would be offered to her by her mother, and also by the fact that upon removal to Nigeria the family unit would be reunited with the children’s father and the partner of the First Appellant. To this extent, whilst I am satisfied that the relatively low hurdle of the first two **Razgar** questions is comfortably cleared by KDU, the gravity of the interference with her private life is compensated by the fact that any temporary upheaval can be managed, and that her family life will be strengthened. Further, for the reasons given above, I do not find that the Appellants have demonstrated any cause for concern in respect of KDU’s medical and educational needs being adequately met in the event of her return to Nigeria.
36. The extent of the interference with KDU’s private life as explored above, needs to be balanced against the public interest concerns pursuant to sections 117A and 117B of the 2002 Act. In respect of section 117B(1) I note that the maintenance of effective immigration control is ordinarily achieved through the consistent application of a published set of Immigration Rules, and further that KDU does not satisfy any of the Rules. There does not appear to be any issue in respect of English language (117B(2)), and although, as a child, not financially independent it appears that KDU is adequately supported through her father’s financial contributions (117B(3)). The Appellants have been present in the UK with leave – including statutorily extended leave because of the appeal proceedings – at all relevant times: there is no hint of unlawful residence (117B(4)); but as noted above immigration status has been precarious at all material times (117B(5)).
37. On balance I find the Respondent’s decision in so far as it impacts upon KDU’s private life to be proportionate. KDU has had the benefit of the medical treatments that prompted her return to the UK in November 2015; she has made a good recovery in respect of her physical illness, and her ongoing treatment regime of prophylactic antibiotics can be continued in Nigeria. While she has entered the

education system in the UK, she will be able to be educated upon her return to Nigeria, and in so far as there is any disruption this will essentially be temporary and not significantly different from the disruption experienced by other migrant children. In this context, and on the facts of this particular case, I acknowledge the importance of stability, and the diagnosis of depression and anxiety – but see no reason why such matters – including the potential psychological impact of the disruption of relocation – cannot be adequately managed in Nigeria with the love and care of both of her parents. I can see nothing sufficiently compelling to justify relaxing the requirements of the Immigration Rules to permit KDU to remain in the UK in circumstances where she does not qualify under the Rules.

38. As noted above, nothing further specific or particular is advanced in respect of the First Appellant or the other minor Appellants. Essentially their cases are based upon KDU's case and stand and fall with it. On my findings their cases fall.

Notice of Decisions

39. The appeals are dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed:

Date: **11 July 2019**

Deputy Upper Tribunal Judge I A Lewis

Appeal Numbers: HU/09550/2017
HU/09555/2017
HU/09557/2017
HU/09560/2017

To the Respondent

Fee Award (*This is not part of the determination*)

I have dismissed the appeals and accordingly there can be no fee award.

Signed:

Date: **11 July 2019**

Deputy Upper Tribunal Judge I A Lewis
(*qua* Judge of the First-tier Tribunal)

ANNEX

TEXT OF ERROR OF LAW DECISION AND DIRECTIONS FOLLOWING HEARING
ON 28 NOVEMBER 2018

1. These are linked appeals against the decision of First-tier Tribunal Judge Malcolm promulgated on 26 July 2018 in which she dismissed the appeals of the Appellants on human rights grounds against a decision of the Respondent dated 18 August 2017 to refuse leave to remain in the United Kingdom.
2. I am persuaded that the decision of the First-tier Tribunal is vitiated for error of law.
3. In the particular circumstances I do not propose to set out here in full the details of the case. The immigration histories of the Appellants and the medical history of one of the Appellants are a matter of record, are known to the parties and are - in almost all regards - not the subject of any particular dispute. The First-tier Tribunal Judge has set out all pertinent matters in her decision. Indeed, notwithstanding my ultimate conclusion, the decision of Judge Malcolm is one of detail and clarity, and - it seems to me - save in one respect, is unimpeachable.
4. For present purposes it is adequate to set out the following matters by way of background.
5. The focus in these proceedings has been on the Appellant KDU (date of birth 21 September 2004). At the age of 1 she was diagnosed with sickle cell disease. In August 2013 she suffered a cerebrovascular accident (or stroke). On 29 September 2013 she came to the United Kingdom with the First Appellant, her mother, for treatment. In due course that treatment involved a bone marrow transplant which took place in October 2014 with the First Appellant as donor. It was considered that this would be an effective way of treating the underlying sickle cell disease. In due course, the operation having taken place and the appropriate recovery period having been observed, the First Appellant and KDU returned to Nigeria in May 2015.
6. During this period of treatment the other children of the First Appellant had remained in Nigeria: the First Appellant has been clear in her evidence - and it has not been disputed - that it was never the intention that she and/or KDU should try and remain in the United Kingdom; it had been the plan to return to Nigeria to resume life there. Further in this regard Mr Richardson has emphasised that this was

not a family that had come to the United Kingdom as so-called 'health tourists'. The treatment that KDU received was at private expense, amounting to approximately £173,000 for the transplant (e.g. see paragraph 51 of the Decision of the First-tier Tribunal).

7. However, shortly after return to Nigeria KDU developed worrying symptoms. In due course these were diagnosed as 'graft versus host' disease ('GVHD'), that is to say that the body (the host) was resistant to accepting the new tissue (the graft) that had been transplanted to the patient. In consequence and upon advice of doctors in Nigeria as to their ability to deal with the issue, the First Appellant and KDU returned to the United Kingdom in July 2015. KDU thereafter underwent further treatment to manage the GVHD, which appears to have been successful. Indeed by the date of the proceedings before the First-tier Tribunal the following matters - as set out in the Judge's findings at paragraph 115-119 - seemingly pertained:

- 115. Whilst there is extensive documentary evidence in the papers of the second appellant's medical condition and treatment, the most up-to-date consultant information is the report from the consultant paediatric haematologist dated 19th April 2017 (pages 57 to 59 of the appellant's bundle). The consultant has noted that it is likely that [KDU] will return to Nigeria and recommends that he see her again on 12th April 2018.*
- 116. In March 2018, a letter was sent indicating that [KDU] was no longer eligible for NHS care and further follow up appointments were cancelled.*
- 117. Since then, the first appellant has simply taken [KDU] to see her GP where she has regular check ups.*
- 118. In addition to being prescribed Penicillin the only treatment which [KDU] is receiving at the moment are check ups with her GP where her bloods are tested and she has three monthly physiotherapy appointments. The first appellant has been given a note of the exercises which [KDU] has to undertake.*
- 119. From this information, I consider it reasonable to assess that there is no immediate concern about [KDU]'s health."*

8. Further to the reference to ineligibility for NHS care at paragraph 116, I understand that notwithstanding that the initial transplant and treatment were funded privately, after her return to the UK in July 2015 KDU received free treatment on the NHS. As noted there was subsequently a communication from the NHS to the effect that she was no longer eligible for such treatment - and thereafter it seems that certain follow-up appointments were not kept.

9. Be that as it may the Judge's evaluation of the evidence - which it seems to me up to this point is entirely sustainable - suggests that the underlying sickle cell disease was being managed in consequence of the remedial effect of the transplant, together with the prescription of penicillin. KDU's active, as it were, ongoing treatment otherwise related to physiotherapy which was to combat the consequences of the cerebrovascular accident that had occurred in 2013. The stroke had left KDU weak of limb and accordingly physiotherapy was undertaken to try and build up strength in this regard.
10. Another consequence of the cerebrovascular accident was, seemingly, an element of cognitive impairment. There is on file a psychological assessment report dated 9 June 2016 prepared by a clinical psychologist at the Imperial College Healthcare NHS Trust assessing the Appellant under the Wechsler Intelligence Scale for Children. The results of that evaluation are somewhat mixed: KDU's verbal comprehension was well within the average range; working memory was shown to be average; perceptual reasoning was lower than average, but still within a normal range; however, KDU's processing speed was extremely low to the extent that she was on the second percentile. The psychological assessment report made various recommendations as to things that the Appellant's school might consider by way of supporting her with her processing speed.
11. There is a further reference in the materials on file to concerns about neurodevelopment. The consultant haematologist treating the KDU wrote a report dated 18 January 2017 reviewing her circumstances. In the context of that report reference was made to a pre-transplant MRI, the details of which are summarised in the report. Upon consideration of the MRI report the consultant haematologist commented:

"Hence I recommend that her GP refers her to a neurology or neurodevelopmental service to assess her limitation and support her needs."

12. There is also on file a copy of a referral letter dated 15 March 2017 written on the letterhead of the KDU's GP to the Neurodevelopmental Clinic, Department of Paediatrics, Northwick Park Hospital (page 93 of the Appellants' bundle before the First-tier Tribunal), making the referral recommended by the consultant haematologist. Reference to the referral is to be found in the decision of the First-tier Tribunal at paragraph 94, amongst the details of the submissions advanced on behalf of the Appellants. It is said that an appointment had been arranged with the neurodevelopmental service which had been cancelled late in 2017. Reference is also made in the same paragraph to the psychological assessment. It was then suggested - with reference to the contents of pages 167 and 168 of the Appellants' First-tier

Tribunal bundle - that the reports had been copied to a consultant paediatric neurologist, in consequence of which the Appellants' counsel "*submitted that the neurologist must have been involved at some stage*". However, the documents at pages 167 and 168, whilst 'copying-in' a consultant paediatric neurologist, are documents that date from September 2014. These do not therefore demonstrate that the consultant neurologist was actively involved in the Appellant's case at the time of the referral made in March 2017.

13. Further, there was a letter before the First-tier Tribunal from a consultant haematologist based in Nigeria. The letter was dated 4 May 2017 and was from the consultant haematologist and head of department at the Department of Haematology and blood transfusion at the University of Port Harcourt Teaching Hospital. It appears - and indeed it was acknowledged before the First-tier Tribunal by the First Appellant - that the consultant in Nigeria was drawing upon the medical evidence provided to him by the First Appellant from the healthcare professionals in the United Kingdom: see paragraph 54. Indeed it may be seen by comparing the letter of 4 May 2017 with the UK based consultant haematologist's letter of January 2017 that the details of KDU's MRI scan are taken from that letter. Having referred to those details the consultant in Nigeria states this:

"... She needs highly specialised regular neurological assessment with neurodevelopmental service which are lacking in Nigeria."

14. It seems to me that this latter quoted passage takes matters beyond the opinions expressed in the source documents - that is to say the documents from the UK healthcare professionals. The consultant haematologist in the United Kingdom does not opine that KDU needs *regular assessment* so much as recommending that she be *referred for an assessment*. What happens thereafter will necessarily be contingent upon that assessment. To that extent it seems to me that the consultant in Nigeria has not accurately set out or reproduced the opinions of the UK healthcare professionals, and has not otherwise identified the basis of his own opinion or his particular expertise in neurodevelopment or neurological matters bearing in mind his stated position as a haematologist.

15. It is, it seems to me, to this that the First-tier Tribunal Judge refers at paragraph 124:

"It was suggested that should [KDU] become ill, that the required treatment would not be available to her in Nigeria. In support of this, reliance was placed on the report from the University of Port Harcourt Teaching Hospital dated 4th May 2017 where it's stated that [KDU] needs highly specialised regular neurological assessments with neurodevelopment services which are lacking in Nigeria. It is to be assumed that there had been neurological involvement at some point (given that reports were copied to the

neurologist) there was, however, no report from a neurologist nor was there any indication that [KDU] required ongoing neurological assessment or assessment with neurodevelopment services."

16. From the foregoing it seems adequately clear that if there had been any neurological involvement it could only be dated in 2014, and there had not seemingly been any neurological involvement subsequent to the referral made in early 2017.
17. However, the fact and terms of the referral in 2017 does, in my judgement, render factually inaccurate the Judge's statement to the effect that there was no indication that an ongoing neurological assessment was required. There was evidence of significantly low (second percentile) processing speed, and in consequence of consideration of an MRI report a consultant's recommendation that KDU be referred "to a neurology or neurodevelopmental service to assess her limitation and support her needs"; there had then been a referral made by KDU's G.P.; but a subsequent appointment had been cancelled - seemingly consequent upon a recognition of ineligibility for NHS treatment. There was no intervening evidence to suggest that the recommended referral was no longer appropriate.
18. The factual misconception in this regard was, in my judgement, material to the consideration of 'best interests'.
19. The Judge says this in respect of best interests at paragraph 142:

"I am fully aware of the requirement to consider the best interests of the children (and in particular [KDU]) but I am not satisfied that the medical evidence is such that KDU's condition adds significant weight to the degree that tip the balance in favour of the appellants when considering whether the decision which has been made is proportionate."

It seems to me that this evaluation was premised on a factual misconception as to the nature of the medical evidence - in particular with regard to neurological deficit and the referral for a neurological assessment. To that extent I am persuaded that notwithstanding the otherwise extremely thorough and careful analysis of this case by the First-tier Tribunal Judge that there was a material error of law.

20. In consequence, the decision in the appeal requires to be remade.

21. Bearing in mind the very thorough treatment of the evidence by the First-tier Tribunal and the absence of any significant dispute on fact, this is not a case that requires to be remitted for a fresh hearing with all issues at large. The appeal is accordingly appropriately retained in the Upper Tribunal.
21. There was a degree of discussion before me as to the possible issues that might arise by reason of the outstanding neurological assessment. Mr Richardson was not in a position to assist as to how it was envisaged that such a neurological assessment would be secured and completed in circumstances where it appeared that KDU was no longer entitled to NHS treatment without payment. The materials that have been filed in preparation for possible remaking of the decision include a confirmation of a referral by way of a letter from the Appellant's GP dated 16 November 2018 stating "*this is to confirm that the above patient has been referred for a neurodevelopment doctor and is awaiting an appointment*". Mr Richardson was not in a position to indicate the extent to which it might be possible for the Appellants to deal with any complication in respect of NHS funding by commissioning a private assessment. Ms Everett for the Secretary of State raised the question as to whether or not there would be any impact on Article 8 private life if it was necessary for that assessment to take place at a location other than the United Kingdom. Mr Richardson's preliminary response to this observation was that the purpose of the assessment was to assist in evaluating the issue of best interests, and it was only once that matter had been properly and duly evaluated that the question of removal could be properly considered.
22. In the circumstances I did not consider it appropriate to proceed immediately to remaking the decision in the appeal, but that the remaking of the decision should be done on a different occasion with the benefit of any further available evidence and submissions from each side in accordance with the following Directions.

DIRECTIONS

- (i) The Appellants should file and serve within 21 days of the promulgation date shown at the top of this document any further evidence, including any further expert evidence upon which they wish to rely, including any neurological and/or neurodevelopmental assessment in respect of KDU, and any consequently updated evidence as to the availability of support to meet KDU's needs in Nigeria.
- (ii) In the event that a neurological and/or neurodevelopmental assessment has not taken place the Appellants are to file and serve within the same timescale evidence indicating why this is so, and should also address by way of evidence the extent to which such an assessment is or is not achievable outside the United Kingdom.

(iii) If no such assessment has been undertaken, both the Appellants and the Respondent should be prepared to make submissions at the next hearing as to the nature and extent of any interference with the Article 8 protected rights of the Appellants - and in particular KDU - if for any reason a neurological and/or neurodevelopmental assessment does not take place in the United Kingdom, bearing in mind that removal (or departure) from the UK would not (subject of course to any evidence filed further to (ii) above) obviously inevitably prevent such an assessment taking place elsewhere.

23. Nothing in the Directions should be interpreted as seeking to proscribe or limit the scope of evidence to be filed or submission relied upon by the parties. The Directions have been prepared with a view to covering the areas of particular discussion at the 'error of law' hearing, and it is acknowledged that other matters may be pursued. The parties are reminded that fair procedure requires due and proper notice of evidence and any substantially new submissions be given to the opposing party.

>>>> End <<<<<