Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01557/2019**

THE IMMIGRATION ACTS

Heard at Field House Via Teams	**Decision & Reasons Promulgated**
On 30 September 2021	**On 08 November 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

AKEEM ADEMOLA ADEYEMI Appellant
(ANONYMITY DIRECTION NOT MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellant: Mr Hashimi
For the Respondent: Mr Tan, Senior Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 26 October 2020, I set aside the decision of the First-tier Tribunal. My reasons were as follows:

> 1. The appellant was born on 25 May 1977 and is a male citizen of Nigeria. He appealed against the decision of the Secretary of State dated 29 November 2018 refusing him leave to remain in the United Kingdom. The First-tier Tribunal, in a decision promulgated on 22 January 2020, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Both parties have responded to directions issued by the Upper Tribunal regarding the disposal of this appeal. The appellant's representatives have served a medical letter dated 17 July 2020 updating the appellant's current condition. They otherwise make no further submissions. The Secretary of State has submitted that the First-tier Tribunal did materially err in law such that its decision should be set aside. Having considered the papers carefully, I agree with both parties that the judge erred in law in his application of the principles set out in N (2005) UKHL 31. No criticism attaches to the judge himself; both parties rely on the judgement in AM (Zimbabwe) [2020] UKSC 17 which was delivered after the First-tier Tribunal determined the appeal. The Secretary of State submits that, in remaking the decision, the Tribunal will need to consider the impact of the appellant's eligibility under the Voluntary Returns Scheme (VRS) on any entitlement on human rights grounds for leave to remain. The required assessment may be undertaken at a resumed hearing before the Upper Tribunal. Both parties may add use fresh evidence provided copies of any documentary evidence (including medical reports and witness statements) sent the other party and to the Upper Tribunal no less than 10 days prior to the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The decision shall be remade in the Upper Tribunal (Listing Directions: Upper Tribunal Judge Lane, if available. if not, any Upper Tribunal Judge or Deputy Upper Tribunal Judge; 2 hours allowed; no interpreter; to be heard remotely by Skype for Business – both parties shall supply their respective contact details within 14 days after receiving this decision; the resumed hearing to be listed at Bradford or Manchester (if to be heard by Upper Tribunal Judge Lane) otherwise at such Upper Tribunal hearing centre as may be convenient for the Upper Tribunal Judge/Deputy Upper Tribunal Judge who conducts the resumed hearing).

2. At the resumed hearing which took place remotely at Field House on 30 September 2021, I heard evidence in English from the appellant. The standard of proof in the appeal on human rights grounds is the balance of probabilities and the burden of proof is on the appellant.

3. The appeal turns on two issues. First, the appellant brings a claim based on Article 3 ECHR medical grounds. The parties agree that: (i) the appellant suffers from chronic kidney disease. He requires dialysis three days per week. His consultant nephrologist (Dr Hilton) states that 'without haemodialysis, [the appellant] would die within a matter of days or weeks. (ii) if the appellant experiences a' lack of access' to appropriate treatment in Nigeria, then he should succeed under Article 3 ECHR (see *AM (Zimbabwe)* [2020] UKSC 17).

4. Secondly, the appellant claims to be in a genuine and subsisting relationship with a British child. He does not live with the child or his mother but claims to have regular contact (including staying contact) with the child. In particular, the appellant claims to collect the child from school and that the child stays with him on weekends whilst the mother is working. The appellant relies on section 117B (6) of the Nationality, Immigration and Asylum Act 2002:

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

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

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

5. I have the same background evidence before me as was before the First-tier Tribunal. In addition, Mr Tan, who appeared for the Secretary of State, sent to me (i) the respondent's Country Policy and Information Note Nigeria: Medical and healthcare issues (ii) a list of dialysis centres in Nigeria (iii) the respondent's Voluntary and Assisted Returns Scheme Version 2.0. I have considered these documents tother with all the other evidence, both documentary and oral, in reaching my decision.

6. Although I have set aside the decision of the First-tier Tribunal, I have, following my own careful evaluation of the documentary evidence, including the new evidence adduced by the respondent, reached findings which mirror those of the Judge Talbot in his decision at [21]. None of the First-tier Tribunal's findings (for the reasons I have in my error of law decision) have been vitiated by error of law (which was, in any event, not a result of the methodology or analysis of evidence carried out by Judge Talbot). Indeed, as the judge stated at the conclusion to his decision, he would, on the evidence, have allowed the appeal on Article 3 ECHR grounds had he not been bound to follow *N [2005]* UKHL 31. *Prima facie*, none of the new evidence substantially contradicts the conclusion of Judge Talbot that 'three sessions of dialysis per week on an indefinite basis would require substantial financial resources for the appellant.' I accept also the appellant's consistent evidence (which Mr Tan did not seek to challenge at the resumed hearing) that, as Judge Talbot found, '[the appellant] has no reasonable expectation of any friends or family who could provide him with appreciable financial support on his return to Nigeria '[21].

7. Before adopting the findings of the First-tier Tribunal as to what Judge Talbot describes as the 'dire consequences' [25] of the appellant's lack of any support network in Nigeria and his patent inability to fund his own treatment in the medium to long term, I have considered the fresh submissions advanced by Mr Tan. In particular, Mr Tan submitted that it was unclear why Dr Hilton had stated that the costs of treatment in Nigeria would be 'too high'. The doctor had not indicated what she meant by that phrase. The implication of Mr Tan's submission is that I should limit the weight which I should attach to Dr Hilton's evidence.

8. Whilst I accept that it not clear exactly what Dr Hilton was told in his instructions about the cost of treatment in Nigeria or, indeed, what he may have found out about the cost from his own investigations, I need to consider what should be the appropriate consequence of that lack of clarity. Dr Hilton has made his comments against a background of publicly available country material which confirms that the costs of treatment which are, in the medium and certainly longer, term beyond the means of an appellant who both parties accept lives on handouts and who would have no obvious prospect of obtaining employment and a sufficient wage to be sure of accessing the continuous treatment which he requires in order to avoid serious suffering and death. Mr Tan may be correct to submit that parts of Dr Hilton's report are unclear but I am not satisfied that I should, as a consequence, reject or attach limited weight to his conclusions. I make those observations in the knowledge that

both parties agree that, if he cannot access continuous treatment, the appellant's circumstances will cross the *AM (Zimbabwe*) [2020] UKSC 17 threshold.

9. Both representatives made submissions regarding the Voluntary Return payment which the appellant would receive if he chose to return to Nigeria of his own volition. The sum appears to be either £2000 (Mr Tan) or £3000 (Mr Hashimi). I accept Mr Tan may be right to submit that the payment would enable the appellant to pay, in the short term, for both accommodation and treatment. However, the payment would only be available to the appellant if he is returned voluntarily; that is an assumption on which it would be unsafe for the Tribunal to proceed. Moreover, without any income to sustain both his daily living and weekly treatment expenses, it is very likely that the appellant's capital will be exhausted in a matter of a few months at best. In my judgment, when the appellant's money runs out, then he would face the real risk of being exposed to serious, rapid and irreversible decline in state of health resulting in intense suffering or a significant reduction in life expectancy (see *AM*). Dr Hilton's evidence on this outcome is clear; if treatment stops, the appellant will 'die in a few weeks.'

10. In the light of my findings, I conclude that the return of the appellant to Nigeria will lead to a breach of Article 3 ECHR.

11. I have considered also the Article 8 ECHR claim relying on Section 117B(6). The doubts cast by Mr Tan on the appellant's evidence of the nature of his relationship with his child (who significantly, is now a Qualifying Child for the purposes of section 117) were not persuasive. Having considered all the evidence, I accept that the relationship is genuine and subsisting. I accept that the child's mother did not attend to give oral evidence because she is working. I accept also the appellant's own evidence of his day to day involvement in the child's care; the school corroborates the appellant's evidence that he collects his child on weekdays (as Mr Hashimi submitted, there is no obvious reason why the school would not give truthful evidence on this point). Moreover, Mr Tan did not submit that it would be reasonable for the child to leave the United Kingdom to live in Nigeria. I find, therefore, that public interest does not require the appellant's removal. I find that the appellant's appeal also succeeds under Article 8 ECHR.

Notice of Decision

I have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 29 November 2018 is allowed on human rights grounds (Article 3 and 8 ECHR).

Signed Date 10 October 2021

Upper Tribunal Judge Lane