Upper Tribunal
(Immigration and Asylum Chamber)

Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 July 2013	**On 24 July 2013**

Before

Upper Tribunal Judge Warr

Upper Tribunal Judge Southern

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ROSELINE ONOSHOAGBE AKHALU

Respondent

Representation :

For the Appellant: Mr C. Avery, Senior Home Office Presenting Officer

For the Respondent: Mr R Toal, instructed by Public Interest Lawyers

(1) MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is a difficulty or inability to access health care in her country of nationality unless, possibly, her private or family life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases.

(2) The consequences of removal for the health of a 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, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal.

DETERMINATION AND REASONS

1.
Roseline Onoshoagbe Akhalu, who was born on 25 September 1963, is a citizen of Nigeria. Although she is the respondent in the appeal before the Upper Tribunal, for ease of reference we shall refer to her as “the claimant” and to the Secretary of State as “the respondent”. She lived alone in Nigeria after being widowed in 1999. She was able to come to the United Kingdom in 2004 having secured, in the face of fierce competition, a scholarship from the Ford Foundation and entry clearance as a student in order to undertake a degree course.

2.
The facts with which we are concerned in this appeal are well known to the parties and, as they are largely settled, it is not necessary for us to recite them again in any great detail. For present purposes it is sufficient to set out the following summary.

3.
Soon after arriving in the United Kingdom to commence her studies, with entry clearance having been granted initially until October 2005, the appellant was diagnosed with end stage kidney failure. It is now accepted and no longer in dispute that she was unaware of this potentially fatal illness, or even that she was unwell at all, until after her arrival. The evidence establishes that to be unsurprising as the nature of that condition is such that a person in the claimant’s position would most likely not have noticed any symptoms. Her condition was diagnosed in a routine medical check.

4.
The claimant required dialysis in order to remain alive and this treatment was provided at a hospital in Leeds. Her leave was progressively extended and, despite having to undergo dialysis several times each week, she graduated in 2008. Although granted a final extension of leave as a visitor, so that she could attend her graduation ceremony, thereafter the respondent has refused all subsequent applications for further leave to remain, of which there have been a number, and there has been since then a complex and continuous process of further submissions, refusals, and further appeals, both before the Tribunal and by way of judicial review.

5.
In July 2009 the claimant received a kidney transplant and thereafter required carefully monitored medication to ensure that the level of that medication in her body is maintained at an appropriate level so that the transplanted organ is not rejected. Quite apart from that, monitoring is essential as too high a level of that medication in the body can prove fatal. She will always remain particularly at risk of infection, because the effect of the medication is to moderate her immune system to prevent rejection, and so appropriate and safe living conditions are essential to her continued health.

6.
While the claimant remains in the United Kingdom her life expectancy and her quality of life will be normal. It is, now at least, accepted by the respondent that she would not be able to access treatment in Nigeria and so would die within weeks. That is not because appropriate treatment and living conditions are not available in Nigeria but because she would not be able to afford to pay for them.

7.
The claimant appealed to the First-tier Tribunal against the removal decision that accompanied the last unsuccessful application for further leave to remain. The issue at that appeal was a simple one but it was also a stark one: Was the refusal to grant leave, with the accepted consequence that the claimant would die soon after removal, such as to breach the claimant’s right to respect for her private life, as protected by article 8 of the ECHR, or was it a proportionate interference with that

right, given that the claimant is not a national of this country and had been admitted for a temporary purpose which has now been concluded?

8.
At the heart of that issue is a particular question of law: On what basis can a claimant succeed in such circumstances under article 8 of the ECHR when it is accepted, as it is here by all concerned, that she could not succeed under article 3. Central to the resolution of that question is a correct understanding of the jurisprudence relating to it. In particular, the respondent argues that the Court of Appeal in MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 has laid down a test to be applied in cases such as this one, where the claimant seeks to rely upon her need for medical treatment and where that treatment may not be available in her country of nationality, the effect of which is to disqualify the appellant from the protection of article 8 unless the private or family life established here has a bearing upon her prognosis. That approach, it is said, reflects the well established principle that an appellant cannot succeed simply on the basis that she cannot obtain in her own country medical treatment that is available to her here.

9.
Mr Toal submits that is an incorrect interpretation of MM (Zimbabwe). We examine those competing submissions below.

10.
The appeal came before First-tier Tribunal Judge Saffer on 21 November 2012. Having considered a very large volume of oral and documentary evidence put before him by Mr Toal, the judge found that there would be a breach of the appellant's rights under article 8 and so allowed the appeal.

11.
The question for the Upper Tribunal is a very different one from that addressed by the First-tier Tribunal. Our task is to examine the challenge brought by the respondent to that decision of Judge Saffer and to decide whether that challenge has identified any error of law disclosed by the determination that requires his decision to be set aside. Unless that is established there is no basis upon which we may disturb his decision, even if that was not the only outcome possible on the facts.

The decision of the First-tier Tribunal

12.
Judge Saffer heard oral evidence from a consultant nephrologist, Dr James Tattersall, and from 6 lay witnesses. There were five further witness statements and a large number of letters of support from people known to the claimant relied upon as well as a range of medical and other expert evidence about the claimant's condition, treatment and prognosis as well as the circumstances in which she would be living on return to Nigeria and the effect of that upon her prognosis.

13.
This was a large body of evidence and it is clear from the determination that the judge had careful regard to all that was before him even though, as he was correct to point out, it was not necessary for him to discuss all of that material in his determination.

14.
The judge summarised the respondent's case as it was argued before him as follows:

"The respondent has not accepted responsibility for her continued and indefinite treatment. It was conceded that she had established a private life here. Her removal would not undermine the organ

transplant system. [The respondent's representative] conceded that she could not afford the treatment in Nigeria and would therefore inevitably die. He submitted that disparity of care is not a reason to allow the appeal. There is physical and emotional support available from family members in Nigeria. It was however proportionate to remove her as her case did not reach the high threshold required in medical cases. There is no absolute protection afforded by article 8."

15.
Pausing there, two points might be made. First, Mr Avery did not suggest that to be an inadequate or inaccurate summary of the respondent's case before the First-tier Tribunal as it was argued before the judge.

16.
Secondly, the concession made by the Presenting Officer that the claimant would not be able to afford the treatment she needed in Nigeria and so would inevitably die was of particular significance. That is because the respondent's reasons for refusing to grant further leave to remain had always been predicated upon a refusal to accept that she would not be able to access the treatment she would need. Until then, the respondent's position had been that this claimant, who had worked in the public sector in Nigeria before coming to the United Kingdom to obtain, as she did, a degree, would be eminently well placed to secure good and well paid employment on return which would enable her to afford the cost of essential life-maintaining medical treatment. The respondent maintained also that the claimant would be able to live with one of her three siblings in Nigeria, two of whom lived in rural homes and the other in accommodation in an urban environment.

17.
It is plain from the evidence before the First-tier Tribunal that the concession was properly and correctly made by the Presenting Officer. There was cogent evidence from a country expert that there was no real chance that this 48 year old claimant with a history of her health problems that would need to be managed carefully would be able to obtain employment of a nature such as to generate in income the sum calculated by a leading Nigerian medical professional as being required. And there was equally cogent evidence to establish that the claimant could not live with any of her siblings. The medical evidence was that it would be wholly inappropriate for the claimant to live in the rural homes as the risk of infection was far too high and the sister in the urban area lived in a two bedroom apartment with her husband and six children, whom she would wish to protect from the upsetting experience of witnessing the inevitable death of the claimant, which would be unavoidable if she were living with the family.

18.
That meant that a main thread of the reasoning upon which refusal to grant further leave had fallen away.

19.
In an admirably concise determination Judge Saffer explained clearly why he had concluded that the appeal should be allowed. Before doing so, he directed himself in terms of the case law to which he had been referred by the parties and reminded himself that the burden remained throughout upon the claimant to establish the facts upon which she sought to rely. Having noted that the claimant was lawfully present in the United Kingdom when she was diagnosed with the illness he said, in a finding that has not been challenged:

"… there is nothing to suggest she was aware of her illness before she came here or that she is a health tourist."

He noted also that the claimant's leave was extended so that she could continue with her studies while being treated for her illness. The judge then recognised the extent to which she had engaged with her local community, saying:

"She has involved herself in the community in a positive way for many years and has many friends, 6 of whom took the trouble to give evidence, a further 10 of whom came to support her in Court, and many more of whom wrote letters of support and signed a petition."

The judge continued:

"I find that she will die within 4 weeks in very distressing circumstances if she is removed from the United Kingdom….:

He accepted the claimant's evidence, supported by the expert evidence, that she could not expect to live with her relatives but rejected two arguments advanced on the claimant's behalf. First, that if she were removed that would have a detrimental effect on the whole process of providing patients with transplanted organs, both because the money invested in the treatment would be wasted and because it would demotivate both potential future donors and the medical professionals involved who would see their work come to nothing. The judge also rejected the submission that the cost of the claimant's continued treatment in the United Kingdom, should she be allowed to remain, which is established by the evidence to be in the region of £5,000 per annum following the transplant, the more expensive dialysis treatment no longer being required, would be recovered in income tax paid by the claimant since her aspirations to secure work were no more than that.

20.
The key findings are found between paragraphs 30 to 32 of the determination, which we reproduce in full, and which indicate that the judge followed the structured approach drawn from R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368 :

"I am satisfied that removal would normally be lawful and would be for the legitimate aim of maintaining the economic well being of the country and retaining the integrity of immigration control by only allowing those to be here who comply with the immigration rules. However the maintenance of the economic well being of the country, given she came here legally and was diagnosed while here lawfully and there was no evidence she knew she was ill before she came here, carries little weight in this particular case.

I am not satisfied it is proportionate to require the appellant to leave given the following constellation of reasons. She has an extensive and productive private life here. The cost of her treatment is not excessive. She came here legally and was diagnosed while here lawfully. There is no evidence she knew she was ill before she came here. She will die very quickly in very distressing circumstances.

Very few cases can succeed under article 8 where they fail under article 3. This is one of them."

21.
On that basis and for those reasons the judge allowed the appeal.

The grounds for appeal

22.
The main ground upon which the respondent asserts that the judge erred in law is that he misunderstood and so misapplied the guidance provided by the Court of Appeal in MM (Zimbabwe) v

Secretary of State for the Home Department [2012] EWCA Civ 279 . That is because, the respondent argues, correctly understood, MM required the judge to apply a test that:

"…makes clear that medical care is only relevant to article 8 where an individual's personal ties to the UK have a direct bearing on their prognosis."

The grounds, adopted by Mr. Avery, assert that in this case the claimant's ties to the United Kingdom are not relevant to her prognosis. Therefore, this is not the sort of case the Court of Appeal had in mind in MM so that it falls to be considered under article 3 only which, as Mr. Toal accepts, would not assist the claimant, in the light of the decision of the Upper Tribunal in GS and EO (Article 3 - health cases) India [2012] UKUT 397 (IAC) .

23.
Secondly, the respondent submits that the judge failed to have sufficient regard to the reported decision of the Upper Tribunal in GS and EO , at paragraph 85:

"It may be that although, in principle, the scope of Art 8 is wider than that of Art 3, in practical terms that 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 (see KH (Afghanistan) v SSHD [2009] EWCA Civ 1354 and MM (Zimbabwe) v SSHD [2012] EWCA Civ 279). [1] That reality may lay at the heart of the majority's view of the Strasbourg Court in N v UK when, having rejected the individual's claim under Art 3, stated that no "separate issue" arose under Art 8 (compare the dissenting Judge's opinion at 1 to 6)."

24.
Finally, the grounds assert that in this case the issue is not a complete absence of treatment in the complainant's country of nationality but the question of her access to it. It is said that the approach of the judge was speculative.

25.
Although permission to appeal was granted specifically on what might be termed the MM point, the grant was not limited to that ground alone.

26.
Having taken us through those grounds, Mr Avery summed up the respondent's position by saying that the care of a foreign national remains the responsibility of her state of nationality and the judge applied MM (Zimbabwe) out of context without having regard to "the wealth of cases about ill-health". For that reason the determination was said to be fundamentally unsound.

27.
In response Mr Toal submitted that the judge made no error of law. MM (Zimbabwe) laid down no such test requiring a nexus or connection between the private life relied upon and the prognosis for her illness. The Court of Appeal simply offered an example of a case that might succeed where such features were present without setting that as a requirement for such a claim to be made out. The judge, he submitted, had regard to all that was before him and reached a conclusion that was plainly open to him so that he made no error of law.

The legal framework

28.
Before considering MM (Zimbabwe) in detail, it is helpful to set out the jurisprudential bedrock upon which it is founded.

29.
Article 8 of the ECHR provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

By section 6 of the Human Rights Act Parliament has imposed an obligation upon public officials to give effect to article 8 and provided that the obligation extends to the courts and Tribunals:

Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

…

(3) In this section "public authority" includes–

(a)

a court or tribunal, and

…..

30.
Reference has been made already in this determination to the determinative effect of GS and EO excluding, in cases such as this, any prospect of resort to article 3 of the ECHR in order to resist removal. GS and EO was concerned directly only with such claims, but the Tribunal did say this, at paragraph 85(8), about the possibility of a claim being made out under article 8, even though it could not succeed under article 3:

"…(b) However, in principle Art 8 can be relied on in cases of this sort. The removal of the individual would, on the face of it, engage Art 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 Art 3, however, Art 8 is not absolute and the legitimate aim of the economic well-being of the country would be relevant in determining whether a breach of Art 8 could be established given any financial implications that continued treatment in the UK would entail (see also R (on the application of Razgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368).

(c) It may be that although, in principle, the scope of Art 8 is wider than that of Art 3, in practical terms that 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 (see KH (Afghanistan) v SSHD [2009] EWCA Civ 1354 and MM (Zimbabwe) v SSHD [2012] EWCA Civ 279). [1] That reality may lay at the heart of the majority's view of the Strasbourg Court in N v UK when, having rejected the individual's claim under Art 3, stated that no "separate issue" arose under Art 8 (compare the dissenting Judge's opinion at 1 to 6).

(d) Again we note that in N v UK the minority disagreed with the failure to address Article 8. We see some force in this. If it be the case that the Article 3 threshold is an exceptionally high one because of the absolute character of the prohibition and concerns that Contracting States could be swamped by health tourism claims by people with no prior connection to the state in question seeking to enter or

remain to gain access to expensive medical treatment, an Article 8 proportionality analysis might yield a different outcome in other cases, possibly where the claimant had a lawful permission to reside in the host state before the disease was diagnosed."

31.
In fact, this route to protection from removal, under article 8, has long been seen to be open in such a case. In Razgar, Lord Bingham observed that it was clear from the decision in Bensaid v United Kingdom (2001) 33 EHRR 205 that:

"…reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked. It is plain that "private life" is a broad term, and the Court has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the Court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life. In Pretty v United Kingdom (2002) 35 EHRR 1 , paragraph 61, the Court held the expression to cover "the physical and psychological integrity of a person" and went on to observe that

"Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."

Lord Bingham continued:

"Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person."

Therefore:

"…the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the applicant are sufficiently strong. In so answering I make no reference to "welfare", a matter to which no argument was directed. It would seem plain that, as with medical treatment so with welfare, an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state."

That echoes what was said at paragraph 46 of Bensaid:

"Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see Costello-Roberts v. the United Kingdom , judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, § 36)."

32.
It might be observed that the claimant in Bensaid was unsuccessful in his claim because the risks relied upon were found to be "largely hypothetical". That cannot be said in respect of this claimant as it is conceded that her death would follow inevitably and rapidly upon her return to Nigeria.

33.

Mr Toal referred us to JA (Ivory Coast) ES (Tanzania) v Secretary of State for the Home Department [2009] EWCA Civ 1353 . This is of interest for two reasons. First, in that decision the Court of Appeal emphasized that in contrasting claims made in health cases under article 3 and article 8 it is not simply a matter of the threshold of engagement being lower in bringing an article 8 claim, because the outcome is subject to a test of proportionality unlike the absolute and unqualified nature of article 3 in the protection it provides for in respect of that which it excludes as a permissible consequence. The two are entirely different. Per Sedley LJ at para 17:

“There is no fixed relationship between Art. 3 and Art. 8. Typically a finding of a violation of the former may make a decision on the latter unnecessary; but the latter is not simply a more easily accessed version of the former. Each has to be approached and applied on its own terms…”

34.
The second point to be drawn from JA (Ivory Coast) is the observation found in paragraph 16 of the same judgement which considers the proportionality balance to be carried out in respect of the article 8 claim in health cases where the public interest arguments include the cost of providing heath care treatment, accepting that the United Kingdom “cannot afford to be the world’s hospital”.

“Here the prescribed purposes are, or include, the economic wellbeing of the country, which cannot afford to be the world's hospital, and the prior right of a settled population to the benefit of its inevitably finite health resources. Against these may legitimately be weighed both the moral duty to help others in need and the fact that the United Kingdom has until recently found it both morally compelling and economically possible to extend such help to the appellants and others like them, alongside and not evidently to the detriment of the settled population.”

35.
The fact is that the appellant has been considered to be someone in respect of whom the United Kingdom should be providing heath care without charge, even after her period of leave to remain had expired: see Regulations 4(1)(iii) and (3) of the National Health Service (Charges to Overseas Visitors) Regulations 1989 (SI 1989/306) as amended.

36.
Which brings us to the question of proportionality. In Huang v Secretary of State for the Home Department [2007] UKHL 11 , at paragraph 20:

“In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.”

And in JN (Uganda) v Secretary of State for the Home Department [2007] EWCA Civ 802 Maurice Kay LJ said:

“Although expressed by reference to family life, that reasoning plainly applies equally to private life cases.”

37.

With that in mind we return to MM (Zimbabwe) and to address the respondent’s assertion, resisted by Mr Toal, that the decision establishes a test requiring in cases such as this that aspects of the private life established in this country must have a direct bearing upon the prognosis for the claimant’s illness.

38.
In MM it was recognised that the Convention did not impose any obligation to provide medical treatment that could not be accessed in the claimant’s country of nationality. Although that principle had been established in respect of claims brought under article 3 of the ECHR, even where the deportee’s life would be significantly shortened as a consequence, there was no doubt that the principle applied equally to claims brought under article 8. Moses LJ said, referring to dicta from Razgar we have set out above:

“Despite that clear-cut principle, the courts in the United Kingdom have declined to say that Article 8 can never be engaged by the health consequences of removal from the United Kingdom……"if the facts relied on by the applicant are sufficiently strong"”

And then recorded the analysis of Baroness Hale:

"Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under Article 3 but succeed under Article 8. There clearly must be a strong case before the Article is even engaged and then a fair balance must be struck under Article 8(2). In striking that balance, only the most compelling humanitarian considerations are likely to prevail over legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries. The question is whether removal to the foreign country will have a sufficiently adverse effect upon the applicant. Nor can the expelling state be required to assume a more favourable status in its own territory than the applicant is currently entitled to. The applicant remains to be treated as someone who is liable to expulsion, not as someone who is entitled to remain."

39.
Recognising the scale of the challenge faced, therefore, by a claimant in this regard, Moses LJ noting that the courts had declined to “close the door on the possibility” of a claim succeeding under article 8 in such circumstances went on, at paragraph 23 of his judgment, to say this:

“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.”

40.
Moses LJ went on to offer the example of a claim that might succeed, this being the passage that Mr Avery asks us to find lays down a test as to the minimum characteristics of such a claim:

“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 a 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."

41.
That does not amount to a requirement of the kind the respondent asserts. Indeed, the ultimate conclusion in MM was that the case was not, properly considered, about a comparison of medical treatment available in this country as opposed to in Zimbabwe but whether, absent a risk of offending, it was proportionate to deport MM, given the strength of the private life he had established here. For that reason, even though the claimant in MM faced deportation for serious violent criminal offences, the appeal was remitted for an assessment of proportionality to be carried out, correctly informed by relevant considerations.

42.
In our judgement, MM (Zimbabwe) does not have the effect of requiring any different approach to be taken to the assessment of proportionality, when that question is reached and the example offered of a claim that might succeed was no more than that.

43.
MM (Zimbabwe) does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is a difficulty or inability to access health care in her country of nationality unless, possibly, her private or family life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases.

44.
When a judge arrives at the question of proportionality he is required to have regard to all of the circumstances relied upon by both parties. If he left out of account aspects of the claimant's private life established here because it could not be shown that they had a direct bearing on her prognosis, the balancing exercise would be fundamentally flawed and legally deficient.

45.
The correct approach is for the judge to have regard to every aspect of the claimant's 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 a 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, as did Judge Saffer, that it will be a rare case that succeeds where this is an important aspect of the claimant's case.

46.
Put another way, the consequences of removal for the health of a 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, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal.

47.

Returning to the circumstances of this claimant we accept that it was open to the judge to find that this was one falling within what he had correctly recognised to be a very small number of cases that could succeed. In doing so he was not limiting his assessment to a comparison of medical treatment available here as compared with in Nigeria. On the evidence before the judge, these were the factors that spoke in favour of the claimant's case:

a.
this was a claimant who had been lawfully present when she fell ill;

b.
she had been provided with medical treatment which she was recognised to be entitled to receive, without charge, from the NHS;

c.
it had been decided to treat her condition by providing a transplanted kidney which would require forever thereafter continued access to treatment of a different kind than she had needed before that, and that she live in a manner that could not be achieved should she be returned to Nigeria;

d.
that despite her illness and the demands of her treatment she had played an active part in community life and had thus established a level of private life that she could never hope to replicate in Nigeria;

e.
that the concession made before the judge meant that a major aspect of the reasoning leading to refusal of further leave had fallen away;

f.
that there was nothing in any way hypothetical or speculative about the inevitable difficult, early and unpleasant death that would follow return to Nigeria;

g.
contrary to the position as the respondent thought it was, the evidence established clearly that the claimant would meet that early death alone, and not with the support of her family.

48.
As we observed earlier in this determination, it may well be that this was not the only outcome possible on the facts in this particular case. But this judge directed himself correctly in law, made clear, both before and after setting out his conclusion that he recognised that very few appeals indeed could succeed in these circumstances, and plainly had regard to the competing arguments, including aspects of the public interest and the economic wellbeing of this country, as he struck a balance between the competing interests in play.

49.
It cannot be said that this was an appeal allowed simply because of a disparity in the treatment available. That is to misrepresent what the judge has said. He plainly concluded that this was one of the "very rare cases" contemplated by the Tribunal in GS and EO (India) that could succeed under article 8 where the claim relies in part upon the need to continue with medical treatment being received here.

50.

Correctly understood, in our judgement, the judge did not allow the appeal simply because the claimant could continue to receive medical treatment here that she would not have access to in Nigeria. His was a holistic assessment, drawing on the truly exceptional level of engagement with her local community that was disclosed by the evidence he alluded to and which he did not need to set out extensively in his determination and a comparison of her ability to enjoy any private life at all in Nigeria, as well as the foreseeable consequences for her health should she be removed to Nigeria.

51.
The Supreme Court, in B (a Child), Re [2013] UKSC 33 observed, in a case concerning a child although the point made is equally applicable here,:

“Into its review of a trial judge’s determination of a child case an appellate court needs to factor the advantages which the judge had over it in appraising the case. In Piglowska v Piglowski [1999] 1 WLR 1360 Lord Hoffmann said, at p 1372:

“The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge’s evaluation of those facts. If I may quote what I said in Biogen Inc v Medeva plc [1997] RPC 1, 45:

The need for appellate caution in reversing the trial judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance...of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation.”

52.
And this was, ultimately, a fact based assessment for the judge to make. In Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045 Carnwath LJ (as he then was) said this:

“Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.”

53.
Drawing all this together, we are satisfied that the judge did not make any error of law and that his conclusion, even if properly characterised as one that might be thought to be a generous one, does not disclose any legal error. The “constellation of reasons” which go considerably wider than the examples of those set out by the judge in paragraph 31 of his determination but which he undoubtedly had in mind, were plainly such as to justify the conclusion that the circumstances here were, if not truly unique, so exceptional as to stand out significantly from the ordinary run of cases where a

claimant complains of being disadvantaged by a comparative lack of medical care in his or her own country. That was not the basis if the decision here.

54.
For all these reasons the appeal to the Upper Tribunal is dismissed and the determination of the First-tier Tribunal will stand.

Signed

Upper Tribunal Judge Southern

19 July 2013