Upper Tribunal
(Immigration and Asylum Chamber)

Okonkwo (legacy/Hakemi; health claim) [2013] UKUT 00401 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 July 2013	.....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE HANSON

Between

BERTHA JOE-OKONKWO

JOSEPH OKONKWO

(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: D. Medhurst instructed by The Legal Resource Partnership

For the Respondent: N. Bramble, Senior Home Office Presenting Officer

(1) It may be unfair for the Secretary of State to fail to apply the terms of a policy to a case that fell within the terms of the policy when it was in existence: Hakemi and others [2012] EWHC 1967 (Admin), and Mohammed [2012] EWHC 3091 Admin considered.

(2) Chapter 53 of the EIG Instructions as in force December 2011 did not mean that any adult who had lawfully resided in the UK for six years had an expectation of discretionary leave to remain, applying former rule 395C together with the policy then in force.

(3) An appellant who has been provided with an organ transplant during a period of lawful leave to remain, and the viability of the success of the transplant would be prejudiced by loss of effective access to immune-suppressant medication may well have a good claim to remain under Article 8 ECHR: see JA (Ivory Coast) ES (Tanzania) v SSHD [2009] EWCA Civ 1353; GS and EO (Article 3-health cases) [2012] UKUT 397; and Akhalu (health claim: ECHR Article 8)[2013] UKUT 400 (IAC)

considered; but the argument must be advanced to the First tier judge before it can be said that there was an error of law in failing to deal with it.

DETERMINATION AND REASONS

Introduction

1.
The appellants are both citizens of Nigeria. They are husband and wife. Bertha Joe-Okonkwo was born in May 1968 and arrived in the United Kingdom on 24 th January 2006 to study and was then granted extensions of stay as a Post-Study Work migrant. She was granted an extension of stay until 2 nd September 2011. Her husband was born in 1965. He came to the United Kingdom as a dependant of his student wife in March 2007 and was give leave to remain in line with that of his wife thereafter. His case is entirely dependent on hers.

2.
Eight months after her arrival in the UK Mrs Okonkwo was diagnosed as suffering from kidney disease. This diagnosis and the associated ill health delayed the completion of her MA in Health and Social Care at Middlesex University. She graduated in June 2009 but was unable thereafter to use her qualification to enter the Highly Skilled Migrants Programme. She was given a period of limited leave for two years for the purpose of post study work experience. She apparently found employment part time dealing with vulnerable adults with learning difficulties although details of her hours worked and remuneration were sparse. Her husband was entitled to work and contributed to the family budget.

3.
Mrs Okonkwo's kidney disease was severe and in December 2010 she underwent surgery at the Royal Free Hospital North London when she was given a kidney transplant. From the medical reports of her Consultant Nephrologist Mr Dupont, dated 13 th May and 11 th November 2011, it appears that the transplant has been successful but for the replaced organ to endure she will need a steady supply of immuno-suppressant drugs to prevent rejection of the organ. She will also need specialised tertiary-level medical care. If her transplanted organ fails she will need regular dialysis using a kidney machine.

4.
In August 2011 the appellant and her husband applied for discretionary leave to remain outside the Rules. They relied on the length of lawful residence of Mrs Okonkwo (over five years); the fact of her transplant; the need for her to remain in the UK for follow up treatment and medication if the operation were to remain a success; and the prospects for failure of the transplant if she were to be returned to Nigeria where the immuno-suppressant drugs were both in short supply and prohibitively expensive for the normal citizen. She pointed out that rule 395 C (viii) of the Immigration Rules required regard to be had to the compassionate circumstances of the case before any removal decision was made.

5.
There was a prompt reply to this application made on 29 th September 2011. The Secretary of State refused the application for an extension of stay. It was pointed out that she was now fit enough for work, and there was no evidence that treatment for kidney disease was not available in Nigeria. It was not accepted that the removal of the appellants to Nigeria 'reaches the high threshold of severity to breach Article 3 and Article 8'. There was no reference to rule 395C and no removal decision was taken in addition to the decision to refuse an extension of stay.

6.
The appellants appealed and the sequence of events may be summarised as follows :

i.
On 27 th November 2011 Judge Schaerf of the First-tier Tribunal concluded that the decision to refuse the appellants' applications for further leave to remain was not in accordance with the law as it was not accompanied by a decision to remove them from the United Kingdom. Consequently there had been no consideration of the compassionate circumstances of the case and other aspects of rule 395 C (viii). The requirement for such 'one stop' decision-making had recently been affirmed by the Court of Appeal in its decision in Sapkota v SSHD [2011] EWCA Civ 1320, 15 November 2011.

ii.
On 13 th February 2012 the Secretary of State abrogated rule 395 C.

iii.
On 6 th March 2012 a fresh decision was taken against Mrs Okonkwo only, refusing her an extension of stay and for her removal from the United Kingdom. A further appeal was entered against this decision complaining that no reasons had been given for it and no equivalent decision had been taken in respect of Mr Okonwo.

iv.
On 1 st June 2012 the Court of Appeal re-examined the decision in Sapkota (above) in Patel v Secretary of State [2013] EWCA Civ 741 and concluded it was per incuriam and that decision and the earlier decision in Mirza on which it was based were wrongly decided; there was no duty to make a removal decision at the same time as a refusal of an extension of stay.

v.
On 4 th October 2012 a new decision was made in respect of both appellants refusing leave to remain and at the same time removing them from the United Kingdom. The human rights aspect of the claim was examined by reference to the new Immigration Rules that came into force on 9 th July 2012; Appendix FM.

vi.
On 8 th November 2012 a panel of the First-tier Tribunal with Judge Schaerf presiding again allowed the appellants' appeals, this time of the basis of the decision of the Upper Tribunal in Ahmadi (s 47 decision: validity; Sapkota) [2012] UKUT 147 (IAC) [1] that it was not possible in law to make a decision to refuse leave to remain and remove at the same time. The statutory scheme contemplated a period of time lapsing between the first decision and the second.

vii.
The Secretary of State appealed to the Upper Tribunal. On 28 th December 2012 Judge Dawson set aside the decision of the panel on the basis of the subsequent Upper Tribunal decision in Adamally and Jaferi (s.47-removal decisions) [2012] UKUT 414 (IAC) 15 November 2012. This decision explained that although the Ahmadi decision decided that refusal of leave to remain and removal could not be combined, the First-tier Tribunal still had to decide whether the first decision was lawful and this had not been done.

viii.

On 20 th March 2013 the decision of the First-tier Tribunal was re-made by Judge Simpson. She dismissed the appeal against the refusal to extend leave but affirmed that the decision to remove the appellants was unlawful.

ix.
The appellants appealed against Judge Simpson's decision dismissing their appeal against the Secretary of State's decision to refuse an extension of stay. On 21 st May 2013 Judge Peter Lane granted permission to appeal and this is the appeal that is now before us.

The decision of the First-tier Tribunal

7.
Before Judge Simpson, the appellants argued as follows:-

i.
The Secretary of State was wrong to apply Appendix FM to this case, as the appellants were still seeking a lawful response to their applications for an extension of stay made in August 2011 and Appendix FM only applied to variation applications made after July 2012.

ii.
The Secretary of State was wrong to fail to make a decision in accordance with rule 395C and substantive injustice had been caused by the failure to do so.

iii.
If the Secretary of State had considered rule 395 C and the associated statement of policy the appellants would have been granted leave to remain because they had been resident in the UK for more than 6 years.

iv.
There were no adequate medical facilities in Nigeria to monitor the appellant's medical condition.

v.
Removal of the claimant would be contrary to Article 3 and this was one of the exceptional cases recognised by the House of Lords in N v Secretary of State for the Home Department [2005] UKHL 31. The United Kingdom has assumed responsibility for the appellant's treatment.

vi.
The fact that the appellant had leave to remain for seven years is a relevant to the Article 3 analysis: see JA (Ivory Coast) ES (Tanzania) v SSHD [2009] EWCA Civ 1353.

vii.
In ZT [2005] EWCA Civ 1421 it was accepted that ostracism, humiliation and deprivation of basic rights might amount to a sufficiently exceptional case to engage Article 3.

viii.
A period of lawful residence followed by a kidney transplant provided on the NHS is an exceptional aspect of private life making it wrong to interfere with her treatment at the Royal Free Hospital.

ix.
The kidney donor would not have expected that the transplant of the kidney to Mrs Okonkwo would be undermined by removal to Nigeria.

x.

The appellant's husband has now given up employment to be with her in the United Kingdom and the couple have a private life in the form of church friends and community ties here.

8.
The Judge accepted point i. above, but nevertheless went on to consider whether there was anything in Appendix FM that might assist the appellant but found there was not.

9.
The Judge rejected points ii, iii, v, vi, and vii; as for points iv, and viii to x, the Judge applied the decision-making process set out in R (Razgar) v SSHD [2004] 2 AC 368 and undertook a full Article 8 assessment of the impact of removal on a woman and her husband who had earning capacity and links to Nigeria where they had both worked previously with the strength of the public interest in removing those who did not comply with the Immigration Rules. She concluded that the interference with the right to respect to private life was justified and proportionate.

10.
The Judge noted that a valid decision to remove the appellants had yet to be made.

The grounds of appeal:

11.
The appellants identified four alleged errors of law in Judge Simpson's decision that can be reduced to two propositions: (i) the Judge had erred in rejecting the human rights claim having regard to the length of lawful residence and the kidney donation and (ii) the Judge was wrong to reject the appellants' case that relied on the unfairness in failing to apply previous policy.

12.
Judge Lane, in granting permission to appeal, saw no merit in the first of these grounds, but considered the second was arguable.

13.
Mr Medhurst, doubtless taking his cue from this indication focused his submissions before us on Ground Two and submitted a skeleton argument repeating the points made to Judge Simpson.

Error of law: Ground Two:

14.
Mr Medhurst's argument proceeds as follows. In Sapkota at the CA said at [124]

'In the case of RS I would allow the appeal. In his case the direction that I would give pursuant to section 87 of the 2002 Act is that the matter be remitted to the SSHD to reconsider RS's application for leave to remain and, in doing so, the SSHD should consider all relevant factors under paragraph 395C of the Immigration Rules. At the same time the SSHD should consider the issue of a possible removal direction pursuant to section 47 of the 2006 Act. Before the SSHD considers these two issues, RS must be given a reasonable time in which to make any relevant representations including representations concerning relevant factors under paragraph 395C of the Immigration Rules. The SSHD will have to consider such representations when making her decision on leave to remain and any possible removal decision under section 47 .'

15.
He then submits that this is what Judge Schaerf was directing the Secretary of State to do by the November 2011 decision and it was never done.

16.
Further, if it had been done any consideration of rule 395 C would have had to take into account the then applicable instructions (EIG Chapter 53 as in force on 8 December 2011) as to how the rules should be operated. The decision of the Administrative Court in Mohammed [2012] EWHC 3091 Admin makes plain that a failure to apply those instructions to a decision where they should previously have been applied can make a subsequent decision conspicuously unfair, and those instructions require in the normal case that a person who has been resident for six years to be given discretionary leave to remain.

17.
The proper meaning of the instructions in EIG Chapter 53 was central to this submission. In our judgement, Mr Medhurst has misunderstood them. By way of preface, we note that the instructions (and indeed rule 395 C itself) both clearly apply to decisions of administrative removal made by an immigration officer under s. 10 Immigration Act 1999 or s.47 of the 2006 Act. By the time the case came before Judge Simpson it was clear that that no lawful removal decision had yet been made and despite previous regrettable uncertainty in the law, there was no obligation in law for the Secretary of State to make decisions to remove at the same time as a decision to refuse leave to remain.

18.
More significantly, at 53.1.2 the instructions make plain that:

'For those not meeting the long residence requirements elsewhere in the immigration rules, the length of residence is a factor to be considered. In general, the longer a person has lived in the UK, the stronger their ties will be with the UK. However, more weight should be attached to the length of time a child has spent in the UK compared to an adult.'

19.
Two paragraphs further on there is a sub-heading 'Residence accrued as a result of delay by UKBA' and the bullet-points relied on by Mr Medhurst are contained in this section of the instructions. The instructions explain that they were created partly in response to the decisions of the higher courts that delay by the Home Office can be a significant factor in the assessment of whether removal is a proportionate interference with human rights.

20.
The instructions give examples of the kind of delay considered significant: an application to the UKBA has been outstanding for over two years and the individual has been making progress inquiries; an in-time application for further leave was submitted some time ago where a significant delay might be considered as three to five years. They then turn to the effect of delay in family cases where delays of four to six years whilst a child is under 18 is considered significant; this is also the case where there has been residence of three years following an individual assessment of the prospects of enforcing removal.

21.
Finally at the end of this section are the words Mr Medhurst relies on :

'Any other case where delay by UKBA has contributed to a significant period of residence, Following (capital F sic) an individual assessment of the prospect of removal, and where other relevant factors apply, 4-6 years may be significant, but a more usual example would be a period of 6-8 years' .

22.

Mr Medhurst says the appellant has been here for six years and there has been delay in making a decision on her case between August 2011 and October 2012. Applying the words of the policy she would qualify for exceptional leave on length of residence alone. We disagree.

23.
Mrs Okonkwo's residence between January 2012 and August 2011 was not because of any delay by the Home Office, but was a consequence of the progress of her studies and the post-study work experience rule. None of this residence was in a capacity that led to an expectation of permanent residence, although there might once have been a hope to admission for such residence under the Highly Skilled Migrants programme. It is well known that in the case of adults, the Immigration Rules (paragraph 276 B (i) (a)) express the length of residence considered necessary by the long standing policy of the Secretary of State reflecting the Council of Europe European Convention on Establishment 1955 to which the UK is party [2] .

24.
There was no delay by the Home Office in any decision making following the August 2011 application. There was a prompt refusal in September 2011 and following appeal further decisions in March 2012 and October 2012 based on assertions of contentious issues of law. Thus the necessary factual predicate for the operation of this part of the policy does not exist.

25.
Further, in our view the proper meaning of the words quoted at paragraph 21 above, are that in the case of adults with no children, residence of between four to eight years may be considered significant but that is residence following an initial assessment of the prospect of removal. Removal was only considered in September 2011 and decisions to remove were made in March 2012 and October 2012 against a background of appeals and the clarification of a complex area of law.

26.
We have already expressed the view that there had been no undue delay from August or September 2011. There was certainly no delay of two, three or four years, that are the relevant periods needed under the instructions depending on whether there has been delay in responding to an application, or inactivity in making a removal decision following initial assessment of removal, and whether such period of inactivity related to an adult or a family where there were children under 18.

27.
We do not understand that this construction of the policy is inconsistent with anything said by Deputy High Court Judge Morris in Mohammed (above) or Burton J in Hakemi and others [2012] EWHC 1967 (Admin), but if we are wrong about this, we respectfully prefer our own reading of the words of the policy set in its context. Mr Medhurst's construction of the text on which he relies would suggest that adults with no children are treated as favourably in terms of length of qualifying residence as those that do, which is inconsistent with the express words of the policy, statutory obligation and common sense.

28.
We accept that whilst the policy remained in force there was a difference in treatment in the cases of adults who had been present in the United Kingdom for the same period of time. Thus one claimant who had six years lawful residence but whose application for leave to remain outside the rules is promptly determined and did not meet the long residence threshold required by the Immigration Rules, could be lawfully removed applying the EIG policy. Another claimant who entered irregularly, then came to adverse attention and is assessed for removal and then no action is taken for four to six

years would be treated more favourably under the policy. An interested observer might consider it peculiar that an irregular migrant is treated more favourably than a regular one when both have been present for the same period of time but the two cases are distinct and the distinction highlights the fact that this part of the policy is concerned with the effect of delay. Although it is always a relevant factor, pure length of residence alone has never been a decisive consideration in immigration decision making.

29.
In the light of our reading of the policy, the centre piece of Mr Medhurst's claim to unfairness falls away. We accept that the Secretary of State has never in terms given a reasoned decision on compassionate circumstances, and it would probably have been helpful if she had done so, but she was plainly aware of all the facts placed before her and was not persuaded that they led to the grant of leave on the three occasions in which she considered the matter.

30.
A health claim is capable of giving rise to a human rights claim, and where it does not meet the human rights test, we are not aware of any current policy, practice or interpretation of compassionate circumstances to suggest that a claimant's poor health gives rise to a decisive consideration in their favour. As there was no clear previous policy that would have given the appellants an expectation of further leave to remain, we conclude that as a matter of generality there is no unfairness to them in the change of those policies during the period of time that the case has been under consideration. We further note that any factors relevant to compassionate circumstances can be examined under Article 8.

31.
Further, we note that the question of unfairness was being considered by Judge Simpson in March 2013 after it had become clear that there was no duty on the Secretary of State to act in the way that Judge Schaerf had understandably concluded that she should have acted in November 2011, and so the supposed illegality of the September 2011 decision has to be seen in the light of the clarification of the law in June 2012 in the case of Patel .

32.
Finally, we conclude that even if the convoluted history of the appeal did require the Secretary of State to take account of her former policy in making a decision to remove the appellants from the United Kingdom, that decision has yet to be taken, and the former policies clearly only applied to such removal decisions.

33.
For all these reasons we are satisfied that Judge Simpson's decision on the accumulation of issues that we have described as Ground Two did not involve the making of an error of law and the appeal on this Ground fails.

Ground One: Human Rights

34.
Both in his skeleton argument and before us, and below, Mr Medhurst's submissions on this aspect of the issue were comparatively brief and principally directed at finding an exception to the high threshold required before a violation of Article 3 ECHR is made out.

35.

On this aspect we agree with the Judge that the case law binding on the UT makes clear that what engages Article 3 is the circumstances likely to result in the place of return when the claimant is deprived of the life supporting treatment received in the host country and that the length and nature of the residence here can have little impact on that.

36.
It is surprising and unfortunate that neither below nor before us did Mr Medhurst cite this Tribunal's decision in GS and EO (Article 3- health cases) [2012] UKUT 397 reported on 24 th October 2012. It is surprising because this is the leading authority of the Tribunal on health based human rights claims. The decision concerned two cases remitted for reconsideration by the Court of Appeal dealing with the impact of loss of life saving kidney dialysis by two claimants who would not be able to afford access to dialysis in their countries of origin India and Ghana with the consequences that they would die within a few weeks of their removal from the United Kingdom. The head-note records the Tribunal's conclusions:

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

(ii) There are recognised departures from the high threshold approach in cases concerning children, discriminatory denial of treatment, absence of resources through civil war or similar human agency.

(iii) Article 8 cases may also require a different approach and will do so where health questions arise in the context of obstacles to relocation.

(iv) Any extension of the principles set out in N v SSHD [2005] UKHL 31 and N v United Kingdom (2008) 47 EHRR 39 will be for the higher courts.

37.
Holding (iii) above demonstrates why it was unfortunate that prior attention was not given to this case. At paragraph 85 (8) the Tribunal noted:

'(a) We were invited not to consider the application of Art 8 in cases of this sort. Neither appellant before us relied upon Art 8. In those circumstances, we do not express any conclusions on the issue.

(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.

(e) In the medical evidence in the present cases, for example, there was some indication that if the claimants were given leave to remain for an appropriate period of time, one or other of then might be eligible for a kidney transplant, the result of which would mean that they were no longer dependent on dialysis. However, in the light of the case law to date and the clear submissions of both parties to us, we have not explored the case from this perspective.'

38.
Such submissions as Mr Medhurst did make as to Article 8 might well have chimed with observation (e) above. Clearly Lord Justice Sedley's remarks in JA (Ivory Coast) [2009] EWCA Civ 1353 were precisely directed at Art 8 and could at least have found the argument that where life saving medical treatment is provided during a period of lawful stay, and such treatment cannot as a matter of financial practicality be replicated in the state of return, removal might well be a disproportionate interference with the physical and moral integrity aspects of the right to respect for private life.

39.
Other advocates have been able to explore the questions left open in GS and EO . In the case of Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC), an unreported decision of the Upper Tribunal promulgated 19 th July 2013, the Tribunal dismissed an appeal by the Secretary of State against a determination of Judge Saffer sitting in the First-tier Tribunal on 21 st November 2012 where he allowed an Article 8 health appeal in a kidney transplant case on the detailed evidence and submissions made to him.

40.
It is to be noted that the relevant National Health Service Regulations for providing free treatment for people from abroad were cited at [35] formed part of the background to the successful submission. So did the contention that the mere fact of organ transplant at public expense by the public health authorities makes a difference. In such cases the claimant's body has been altered by the provision of an organ resulting from an operation that has been provided by the public health authorities applying both NHS regulations as to who was able to access this treatment and the criteria for priority in transplant treatment where there is a waiting list. Immigration status is a relevant consideration in both circumstances. The success of the operation depends on the continued supply of medication to prevent the body rejecting the implant and removal where access to such medication is impractical would directly threaten the availability of the operation and undermine the health resources of the state allocated to this patient. This seems to us to be a very direct incidence of the state needing to respect a bodily and physical integrity it has participated in creating and raises issues missing from cases where the claim is for continued treatment to address the symptoms of natural disease. We understand from the evidence in this case that the annual costs of kidney dialysis in the UK would be £30,000 and much more in Nigeria, while the costs of medication and hospital check ups is significantly less, and in Akhalu at [19] assessed at £5,000 per annum.

41.

We are satisfied that the facts of the present case raise seriously arguable issues that might well result in a successful outcome for the appellants. These issues have never been considered by the Secretary of State nor the Judge.

42.
Our jurisdiction is confined to cases where the Judge has made an error of law and Mr Bramble accurately submits that the Judge cannot be said to have made an error of law where the relevant submissions and authorities were not deployed before her.

43.
This was hardly a point that can be said to have been so obvious that the Judge should have considered it for herself. Until Akhalu we are unaware of an authority where an Article 8 submission succeeded in a health case concerned solely with adults. The UT in that case did not perform its own analysis and decide the issues for itself but dismissed the appeal because it considered that on the evidence and argument deployed before him the judge was entitled to reach the conclusion that he did. We further note at [19] that the judge in Akhalu rejected the submission that the removal of that appellant would deter kidney donors from coming forward in the future, which was a submission very close to that made by Mr Medhurst in this case. As a distinct submission Judge Simpson was entitled to reject it in the present appeal without making an error of law.

44.
The problem before us is that a coherent Article 8 submission was never developed and relevant material evidence was not provided. The appellants were represented by experienced counsel and solicitors who had succeeded in two first instance appeals prior to the present one. We are satisfied from the skeleton argument before the Judge that the principal submission was the construction of the policy issues considered in Ground Two above, rather than an Article 8 challenge.

45.
The Judge did not repeat the mistake of the Secretary of State in October 2012 and imagine that the private life issue was concluded by the application of Appendix FM that was not applicable to a pre July 2012 applications and was in any event silent on health claims under Article 8, no doubt because of their novelty and rarity. We also note the instinctive response of Judge Lane, an extremely experienced and well informed judge of the Upper Tribunal to the appellant’s human rights grounds.

46.
In these circumstances we conclude that we cannot find that the Judge made an error of law in reaching the conclusions that she did for the reasons that she did. She was right to reject the submission that removal of the appellants was disproportionate because it would have contradicted the expectation of the donor. This was not the issue at all and that the length of residence alone or residence combined with the church friendships the appellants had made, made a refusal of extension of stay disproportionate.

Conclusions

47.
We accordingly reach the conclusion that neither ground of appeal has been made out and there is no basis for concluding that the judge has made an error of law in the determination.

48.

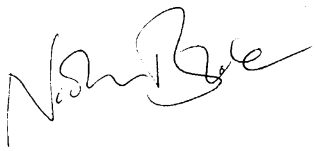
We would be rather concerned if this conclusion was the last judicial examination of the issue and if it had been we would have positively invited the appellants to submit full evidence of their economic resources; their most likely residence in Nigeria and the costs of medication and care there and make a fresh claim in the light of Akhalu and the arguments reflected therein.

49.
It is not necessary to do so, because for reasons already noted no removal decision has been made and it will be need to made before Mrs Okonkwo can be returned to Nigeria and face the health consequences of such a removal; that removal decision will have to take into account of all circumstances relevant to the exercise of the statutory power including a current assessment of an Article 8 health claim, any considerations relevant to removal under current policy guidance and perhaps a reflection on what the position would have been in 2011 had the former 395 C compassionate circumstances rule been addressed then.

50.
There is a fresh right of appeal against a different immigration decision and the previous rejection of the human rights claim by Judge Simpson will not preclude examination of a properly argued and evidentially supported Article 8 health claim in the light of our comments at [41] above and the developing case law. The appellants will be well advised to put before the Secretary of State any further information and submissions on which they rely, promptly on receipt of this determination. The appellate history recounted above is an unfortunate one and it is in both the public interest and those of the appellants themselves that debate as to their future residence should reach a conclusion.

51.
However, for the reasons set out above, these appeals are dismissed.

Signed



Chamber President of the Upper Tribunal

Date: 29 July 2013

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[1] Subsequently approved in the Court of Appeal in Secretary of State for the Home Department v Ahmadi [2013] EWCA Civ 512

[2] Article 3 of which reads

1. Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against ordre public or morality.

2. Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.

3. Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this article are of a particularly serious nature .