Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13374/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 April 2019	**On 06 June 2019**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

AUDENE [M]
(No anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Bond of Counsel
For the Respondent: Ms Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the Philippines born in 1969. He appealed against a decision of the respondent made on 11 June 2018 to refuse his application for leave to remain on the basis of his private life and medical conditions.

2. The immigration history in summary is that he entered the UK with entry clearance in February 2002. In January 2003 he sought indefinite leave to remain as a dependant relative which was refused in June 2003. In March 2013 he sought leave to remain on family and private rights grounds which was refused. In June 2015 he lodged a judicial review. Permission was refused in November 2015.

3. The basis of the refusal of the current application, made on 29 November 2017, is that the appellant did not satisfy paragraph 276ADE(1)(vi) of the Rules. Also, there were no exceptional circumstances outside the Rules. Consideration had been given to evidence that he receives kidney dialysis three times a week. The respondent noted the claim that the appellant would not be able to afford treatment in the Philippines. The respondent added that there is a centre in Manila which provides free treatment. If he had to pay for treatment such would not make his circumstances exceptional such that he is entitled to remain in the UK.

4. He appealed.

First tier hearing

5. Following a hearing at Taylor House on 19 December 2018 Judge of the First-Tier Tribunal Abebrese dismissed the appeal having heard evidence from the appellant, his aunt, mother and sister. In summary, he found that the appellant could not satisfy paragraph 276ADE(1) of the Rules nor were there factors justifying exceptional circumstances outside the Rules.

6. He sought permission to appeal which was granted on 18 March 2019. The crux of the grounds, reiterated by Ms Bond, was that the judge failed to make clear and intelligible findings of fact on the core issues including whether he would be able to access dialysis treatment in the Philippines. Also, he misapplied the test for very significant obstacles to reintegration, wrongly taking into account precariousness and legitimate expectation. Further, he misapplied section 117B(4) when he stated that he gave no weight to any private life acquired. In that regard he was providing emotional support to his mother and aunt.

7. Ms Willocks-Briscoe's response was that while the judge had erred in law in failing to correctly apply the test in section 117B(4) it was not material. As for his treatment of paragraph 276ADE he had given adequate reasons. All in all, the case was hopeless under Article 8 private life. The jurisprudence indicated that it could not succeed on medical grounds.

Consideration

8. I consider that the judge's decision does show material error. It suffices to note the following. He failed to make clear and intelligible findings of fact on the core issues under the Rules and Article 8. At [22] he appeared to accept that the appellant would have difficulties in accessing the

treatment that he requires and that it would be costly. At [28] he stated: *'The appellant … could obtain medical treatment in his country although access is limited and it would be costly it is not reasonable to expect the appellant to find the resources to pay for the treatment as he should have done whilst he was in this country.'* Then, *'the evidence suggests that there is a limited free service at Manila dialysis centre and the appellant would be competing with local residents for the service I do think it is unreasonable for the appellant to seek to source these facilities.'*

9. It is difficult to understand what the judge is saying without reading in *'… not **un**reasonable to expect the appellant to find the resources …'* and *'… I do **not** think it is unreasonable for the appellant to seek to source these facilities.'*

10. Further, in considering paragraph 276ADE he erred in taking into account the appellant's precarious immigration status and whether or not he had a legitimate expectation that he would be allowed to remain in the UK. The issue of whether the appellant's immigration status is precarious is not relevant to the criteria under paragraph 276ADE: all applicants under that paragraph have precarious status. The purpose of the paragraph is to permit those who satisfy the criteria under the various subparagraphs to remain in the UK. If a person satisfies the criteria under the Rules he will be able to show that the decision to refuse the application is not proportionate.

11. In failing to make clear findings he materially erred.

12. Further, he applied the wrong approach to the assessment of private life under Article 8. He stated he had given no weight at all to the appellant's private life because his immigration status was precarious. Section 117B(4) directs a judge to give "*little weight*" to a private life in such circumstances.

13. I set aside the decision for it to be remade. Ms Bond asked that in such event the matter be put back to a resumed hearing so that an up to date medical report could be got. Also, no interpreter had been requested for the appellant. In accordance with the directions I consider it appropriate to proceed to remake the decision. There is no dispute on the facts.

14. The appellant's claim is his right to remain in the UK on the basis of his private life. Paragraph 276ADE states the requirements to be met by an appellant on that basis. Paragraph 276ADE(1)(vi) reads:-

> *'… has lived continuously in the UK for less than 20 years … but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.'*

15. In ***Treebhawan and Others*** **(NIAA 2002 Part 5 – compelling circumstances [2017] UKUT 13** it was stated (at [37]): '*The other limb*

of the test "very significant obstacles" erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even when multiplied, will generally be insufficient in this context.'

16. Comment on that passage was made by Underhill LJ in ***Parveen v SSHD* [2018] EWCA Civ 932** (at 9]): *'I have to say that I do not find that a useful gloss on the words of the rule. It is fair enough to observe that the words "very significant" connote an "elevated" threshold, and I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval." But I am not sure that saying that "mere" hardship or difficulty or hurdles, even if multiplied, will not "generally" suffice adds anything of substance. The task of the Secretary of State or the Tribunal, in any given case is simply to assess the obstacles relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as 'very significant.'*

17. In this case the appellant has spent the bulk of his life in the Philippines. He is familiar with its customs and its language. He has a home there whose current occupant is a family member. Even if he is unable to live in it and by custom it cannot be sold, there seems no reason why he cannot rent a property. His position is that during his many years of unlawful stay in the UK his sister, who is in full time work, has supported him financially. Through her he has been financially independent. There seems no reason why his sister could not continue to support him were he to return.

18. The thrust of his position is his ill health. It appears to be undisputed that he requires kidney dialysis treatment three times a week. It also appears to be undisputed that free dialysis treatment is available in Manila. Detail in that regard is given in a response to a country of origin information request (p108ff respondent's bundle). He is not from Luzon but from one of the southern islands. No reason has been given why he cannot rent in Manila. Even if he is unable to access free treatment there is no reason why with the continuing help of his family the medical costs could not be met. Whilst it may well be that the emotional support he gets from family members here would be lessened if he returned there is, as he indicated, some family in the Philippines. It has not been suggested they would not help him as necessary.

19. On the facts before me I accept that the appellant would face obstacles on return but I do not find these on the evidence before me to be at a level of hardship or difficulty such as to be '*very significant*.' He does not satisfy paragraph 276ADE(1)(vi).

20. Turning to consider human rights outside the Rules, Article 3 has not been argued.

21. As for Article 8, it is not suggested that the appellant has family life in the UK. The issue is private life.

22. In that regard I have no reason to doubt that he has close emotional ties with his mother, aunt and sister. Such is an aspect of his private life. That apart there is no information as to what other aspects of his private life in terms of ties or connections he may have developed during his long period as an overstayer since he arrived in 2002. His health is, of course, an aspect of his private life in the context of his physical and moral integrity.

23. It is clear that the appellant's removal would be an interference with the appellant's right to respect for his private life and that the consequences are sufficient to engage Article 8. Such interference is in accordance with the law and necessary in the interests of the economic wellbeing of the country.

24. The issue, thus, is proportionality. As noted above he would be returning to the country where he has spent most of his life. He is familiar with the language and culture. His claim hangs on his medical condition. The appellant has end stage kidney disease which requires dialysis three times a week.

25. In ***GS (India) and Others*** **[2015] EWCA Civ 40** it was held that if the Article 3 claim failed, Article 8 could not prosper without some separate or additional factual element which brought the case within the Article 8 paradigm: the core value protected being the quality of life not its continuance. That meant that a specific case must be made under Article 8. The rigour of the ***D*** exception (***D v UK*** [1997]) 24 ECHR) for the purpose of Article 3 in such cases as these applied with no less force when the claim was put under Article 8. Although the UK courts have declined to state that Article 8 could never be engaged by the health consequences of removal from the UK, the circumstances would have to be truly exceptional before such a breach could be established (paras 45, 85-87 and 106-111). At paragraph 111, Underhill LJ said this: *'First, the absence or inadequacy of medical treatment, even life preserving treatment in the country of return, cannot be relied upon at all as a factor engaging Article 8: if that is all there is, the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle.'*

26. In ***SL (St Lucia) v SSHD*** **[2018] EWCA Civ 1894** the Court of Appeal commented that the focus and structure of Article 8 is different from Article 3. An absence of medical treatment would not of itself engage Article 8. The only relevance would be where that was an additional factor with other factors which themselves engage Article 8. ***Razgar*** was referred to for the proposition that only the most compelling humanitarian considerations were likely to prevail over legitimate aims of immigration control.

27. In this case the evidence is that the appellant can access free medical treatment for his condition. More widely, in adapting to life in the Philippines he can continue to receive the financial support he has evidently received from his sister the past fifteen years he has been here unlawfully. Even if he is not able to access such free treatment in Manila, I find on the evidence that, through his sister, he can afford to pay for it. There is family in the Philippines who can give emotional and other support.

28. He has built up any private life in the UK when he had no right to be here and for some of that time has accessed expensive NHS resources without paying. I give little weight to private life established while he has been here unlawfully (Nationality, Immigration and Asylum Act 2002, section 117B(4)). He does not speak English (section 117B(2)). The fact that, through his sister, he is financially independent (section 117B(3)) is a neutral factor.

29. Under section 117B(1) the maintenance of immigration controls is in the public interest. I do not see there to be special or exceptional circumstances in this case. On the evidence before me the right to respect for the appellant's private life is outweighed by the public interest in the removal of the appellant.

30. Ms Bond submitted that the appellant was not fit to fly and was not likely to be able to do so. In fact, the letter from a doctor at Barts NHS Trust (22 May 2018) states he '*would have concerns about* (his) *fitness to travel at present due to his ongoing medical issues, in particular the unresolved inflammation of his appendix on CT scan.'* No doubt the respondent would make up to date enquiries and make travel arrangements accordingly.

Notice of Decision

31. The decision of the First-Tier Tribunal showed material error of law. It is set aside and remade as follows:

The appeal is dismissed on human rights grounds

No anonymity order made.

Signed Date 04 June 2019
Upper Tribunal Judge Conway